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33

VOL. 10 - NOV. N. Y. SUPREME COURT REPORTS.

10 3	10 120	10 277	10 435	10 571
24 97	33 332	10 269	17 563	79a 637
10 7	10 124	11 396	19 550	10 578
70a 609	29 360	12 146	37 321	21 571
10 9	69a 444	12 229	10 453	10 590
73a 189	10 128	19 623	17 405	97a 594
10 16	25 625	37 311	21 361	10 592
55 595	10 133	73a 223	77a 58	15 345
70a 607	73a 615	10 289	94a 45	17 147
10 18	10 137	23 315	10 459	72a 491
76a 50	69a 612	70a 481	74a 6	10 589
10 20	10 140	10 295	10 466	14 611
74a 619	17 58	76a 609	74a 295	10 591
10 23	73a 218	10 304	10 468	52 19
74a 183	10 148	11 65	14 195	10 593
10 37	13 272	12 83	75a 516	21 91
19 149	69a 358	28 422	81a 15	29 85
10 41	10 156	30 524	10 471	40 104
94a 614	74a 63	70a 101	47 79	73a 447
10 44	10 158	10 308	72a 269	10 596
73a 195	14 517	71a 603	10 474	72a 279
10 49	10 160	10 311	39 619	10 598
71a 315	72a 442	13 207	10 481	73a 579
78a 367	10 167	29 501	12 168	10 604
10 56	74a 246	55 095	10 489	71a 325
24 654	10 173	72a 400	14 458	
98a 297	24 96	10 328	21 90	
10 59	44 307	79a 303	10 493	
43 222	10 183	10 343	42 266	
73a 399	70a 1	97a 234	42 267	
10 66	10 187	118a 585	10 494	
73a 315	14 498	10 348	41 599	
10 68	10 189	16 462	10 495	
12 310	39 123	10 358	74a 1	
15 196	49 146	75a 13	10 502	
10 73	55 462	10 362	13 342	
14 416	120a 380	13 597	10 511	
76a 197	10 194	25 339	15 282	
76a 201	35 126	10 366	16 348	
10 77	10 201	27 56	80 369	
23 431	22 298	28 509	74a 486	
73a 230	83a 365	33 216	10 515	
10 83	10 211	48 14	74a 338	
72a 184	17 597	10 372	10 520	
10 89	10 232	21 330	24 276	
72a 170	22 586	75a 289	10 525	
10 91	35 142	10 378	18 296	
42 204	38 585	74a 290	22 462	
99a 305	90a 206	10 397	39 305	
10 93	10 236	10 397	10 528	
72a 1	36 897	13 194	12 297	
10 95	10 246	47 39	31 244	
72a 548	42 31	72a 604	10 531	
10 97	10 248	85a 283	35 611	
25 484	70a 604	10 405	74a 610	
41 98	83a 120	38 48	10 540	
10 106	10 253	10 413	114a 478	
76a 613	70a 5	73a 430	10 545	
10 112	10 255	10 429	14 310	
69a 353	17 596	75a 542	71a 481	
70a 476	73a 607	10 428	10 548	
10 113	10 264	21 86	20 159	
69a 353	12 146	73a 452	10 551	
10 117	10 272	10 431	74a 310	
20 13	71a 269	42 647	10 554	
34 522		74a 609	36 173	
83a 7			10 569	
			76a 306	

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33

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### *Eighth Judicial District.*

*CAUSES in which the decisions contained in Hun's Reports from volume 1 to volume 10, inclusive, have been passed upon by the Court of Appeals prior to July 1st, 1877.*

	HUN, VOL.	PAGE.
ACKERMAN v. GORTON.....	6	301
<i>Reversed, and judgment ordered for plaintiff and for a specific performance of the contract: September 26, 1876.</i>		
ADAMS v. GREENWICH INS. CO.....	9	45
<i>Affirmed: June 12, 1877.</i>		
ADAMS v. IVES .....	1	457
<i>Judgment affirmed: December 21, 1875. (63 N. Y., 650.)</i>		
ADAMS v. PEOPLE.. ..	8	654
<i>Judgment affirmed: November 28, 1875. (63 N. Y., 621.)</i>		
ADRIANCE v. LAGRAVE.....	1	689
<i>Order of General Term reversed, and order of Special Term affirmed: November 24, 1874. (59 N. Y., 110.)</i>		
ALEXANDER v. GERMANIA FIRE INS. CO.....	2	655
<i>Reversed, and new trial granted: February 22, 1876. Motion for reargument denied with ten dollars costs: March 28, 1876.</i>		
ALLISON v. WELLER.....	8	608
<i>Affirmed: April 25, 1876.</i>		
ALLISON v. WELLER.....	8	620
<i>Affirmed: April 25, 1876.</i>		
ARKELL v. COMMERCE INS. CO.....	7	455
<i>Affirmed: April 8, 1877.</i>		
ARNOT, EXECUTRIX, v. ERIE R. R. Co .....	5	608
<i>Affirmed: November 21, 1876.</i>		
ARNOT v. PITSTON AND ELMIRA COAL CO .....	2	591
<i>Reversed, and new trial: March 29, 1877.</i>		
ARTHUR v. GRISWOLD.....	2	606
<i>Appeal dismissed: February 16, 1875. (60 N. Y., 143.)</i>		
ARCTIC FIRE INS. CO. v. AUSTIN.....	8	195
<i>Reversed, new trial ordered: May 22, 1877.</i>		
ATWELL v. BROWN .....	1	499
<i>Judgment affirmed: January 19, 1875. Motion for a reargument denied: March 30, 1875. (59 N. Y., 655.)</i>		
BAILEY v. BERGEN.....	2	520
<i>Affirmed: November 28, 1876.</i>		
BAKER v. ARNOT .....	2	682
<i>Affirmed: December 12, 1876.</i>		
BAKER v. HOME LIFE INS. CO .....	2	402
<i>Appeal dismissed: November 30, 1875. Affirmed: March 21 1876. (64 N. Y., 648.)</i>		



	HUN, VOL.	PAGE.
BAKER AND OTHERS v. LEVER .....	5	114
<i>Affirmed: November 14, 1876.</i>		
BANKER v. BANKER.....	4	259
<i>Affirmed: December 14, 1875. (43 N. Y., 409.)</i>		
BARLOW v. MYERS.....	3	720
<i>Reversed and new trial granted: January 25, 1876. (64 N. Y., 41.)</i>		
BARNESCIOTTA v. PEOPLE .....	10	187
<i>Affirmed on opinion of DAVIS, J., below: April 10, 1877.</i>		
BARTEAU v. PHOENIX MUT. LIFE INS. CO. ....	1	430
<i>Affirmed: November 28, 1876. Motion for reargument denied, with ten dollars costs: December 19, 1876.</i>		
BAYLIS v. SOUDDER.....	6	300
<i>Affirmed: November 28, 1876.</i>		
BECK v. CARTER.....	6	604
<i>Affirmed: January 30, 1877.</i>		
BECKER v. HOWARD .....	4	359
<i>Affirmed: April 18, 1876. Motion for reargument denied, without costs: May 30, 1876.</i>		
BENNETT v. N. Y. C. AND H. R. R. R. Co. ....	5	599
<i>Affirmed: May 22, 1877.</i>		
BESSEL v. N. Y. C. AND H. R. R. R. Co. ....	9	457
<i>Reversed and new trial: June 12, 1877.</i>		
BIELSCHOWSKY v. PEOPLE.....	3	40
<i>Judgment affirmed: February 16, 1875. (60 N. Y., 616.)</i>		
BIGELOW v. BENEDICT .....	9	429
<i>Affirmed: June 19, 1877.</i>		
BISHOP v. BARTON.....	2	436
<i>Affirmed: February 22, 1876. (64 N. Y., 637.)</i>		
BLAIR v. WAIT.....	6	477
<i>Affirmed: March 20, 1877.</i>		
BOARDMAN v. GAILLARD . ....	1	217
<i>Judgment affirmed: February 16, 1875. (60 N. Y., 614.)</i>		
BOHNET v. LITHAUER .....	7	238
<i>Appeal dismissed: June 13, 1876.</i>		
BOOS v. WORLD MUT. INS. CO. ....	4	138
<i>Affirmed: February 22, 1876. (64 N. Y., 236.)</i>		
BORDEN v. SOUTH SIDE R. R. Co. OF L. I. ....	5	184
<i>Affirmed: October 6, 1876.</i>		
BORST v. L. S. AND M. S. R. R. Co. ....	4	346
<i>Affirmed: June 13, 1876.</i>		
BOWERY NATIONAL BANK v. MAYOR .....	3	639
<i>Judgment reversed and new trial granted: December 7, 1875. (63 N. Y., 336.)</i>		

	HUN, VOL.	PAGE.
BOWERY SAVINGS BANK v. RICHARDS.....	3	366
<i>Appeal dismissed: June 15, 1875. (62 N. Y., 631.)</i>		
BRENNAN v. MAYOR .....	1	315
<i>Judgment reversed and new trial granted: June 25, 1875. (62 N. Y., 365.)</i>		
BRETT v. FIRST UNIV. SOC. OF BROOKLYN.....	5	149
<i>Affirmed: March 28, 1876. (64 N. Y., 651.)</i>		
BRICK v. BRICK.. .....	3	617
<i>Affirmed: May 23, 1876.</i>		
BRICK v. BRICK .....	3	617
<i>Judgment of the Court of Appeals modified so as to affirm judgment of Supreme Court, without costs to either party as against the other in this court, and remittitur amended accordingly: June 13, 1876.</i>		
BROWN v. BROWN .....	1	443
<i>Judgment reversed, and case remitted for hearing upon the merits: November 10, 1874. (58 N. Y., 609.)</i>		
BROWN v. POST.....	1	303
<i>Judgment affirmed: September 28, 1875. (62 N. Y., 651.)</i>		
BROWNELL v. AIKEN.....	6	378
<i>Appeal dismissed: April 25, 1876.</i>		
BRUNER v. MEIGS....	6	203
<i>Affirmed: April 4, 1876. (64 N. Y., 506.)</i>		
BUCHAN v. RINTOUL.....	10	183
<i>Order affirmed: May 22, 1877.</i>		
BURGER v. HUGHES.....	5	180
<i>Judgment affirmed: November 30, 1875. (63 N. Y., 629.)</i>		
BYRNES v. CITY OF COHOES .....	5	602
<i>Affirmed: November 14, 1876.</i>		
CAGGER v. LANSING.....	4	812
<i>Affirmed: March 21, 1876. (64 N. Y., 417.)</i>		
CAMERON v. SEAMAN.....	7	601
<i>Reversed and new trial: April 24, 1877.</i>		
CARROLL v. CARROLL.....	2	609
<i>Judgment reversed and new trial granted: February 16, 1875. (60 N. Y., 121.)</i>		
CENTRAL CITY SAVINGS INSTITUTION v. WALKER .....	5	34
<i>Affirmed: June 20, 1876. Motion for reargument denied, with ten dollars costs: November 28, 1876.</i>		
CHADWICK v. FONNER .....	6	543
<i>Reversed and new trial: April 24, 1877.</i>		
CHANDLER v. HOAG.....	2	613
<i>Order granting new trial affirmed, and judgment absolute for plaintiff in accordance with opinion of Supreme Court: November 30, 1875. (63 N. Y., 624.)</i>		

	HUN, VOL.	PAGE.
CHAPMAN SLATE COMPANY v. SUTCLIFFE.....	2	684
<i>Judgment affirmed: October 8, 1875. (63 N. Y., 616.)</i>		
CHIPMAN v. MONTGOMERY.....	4	739
<i>Judgment affirmed: November 28, 1875. (63 N. Y., 221.)</i>		
CHURCH v. MALOY.....	9	148
<i>Affirmed: June 5, 1877.</i>		
CLAFLIN v. LENHEIM.....	5	269
<i>Reversed, new trial ordered: June 6, 1876.</i>		
CLARK v. DONALDSON .....	3	224
<i>Affirmed: February 8, 1876. (64 N. Y., 631.)</i>		
CLEARWATER v. BRILL.....	4	726
<i>Judgment reversed, and new trial granted: November 30, 1875.</i> <i>(63 N. Y., 627.)</i>		
CLEMENCE v. CITY OF AUBURN.....	4	386
<i>Order affirmed and judgment absolute on stipulation: June 6, 1876.</i>		
CLEVELAND v. NEW JERSEY STEAMBOAT CO.....	5	523
<i>Reversed, new trial: January 30, 1877.</i>		
CODDING v. WALMSEY....	1	585
<i>Judgment affirmed: April 13, 1875. (60 N. Y., 644.)</i>		
COLE v. MALCOLM.....	7	31
<i>Order of Special and General Term reversed and motion granted: June 6, 1876.</i>		
COLE v. NILES. ....	3	326
<i>Judgment affirmed on opinion of court below: June 25, 1875.</i> <i>(62 N. Y., 636.)</i>		
COLE v. VAN KEUREN.....	4	262
<i>Affirmed: March 21, 1876. (64 N. Y., 646.)</i>		
COLEGROVE v. TALLMAN .....	5	108
<i>Order affirmed, and judgment absolute for defendant on stipulation, with costs: October 3, 1876.</i>		
COLEMAN v. THE PEOPLE.....	1	596
<i>Judgment affirmed: November 10, 1874. (58 N. Y., 555.)</i>		
COLMAN v. SHATTUCK.....	2	497
<i>Judgment affirmed: June 25, 1875. (62 N. Y., 848.)</i>		
COLTON v. FOX.....	6	49
<i>Affirmed: November 28, 1876.</i>		
COOK v. ALLEN.....	5	561
<i>Affirmed: September 19, 1876.</i>		
COOK v. CLARK.....	3	247
<i>Order affirmed, and judgment absolute for the plaintiff on stipulation:</i> <i>January 16, 1877.</i>		
COOK v. WARDEN, ETC., ST. PAUL'S CHURCH, HAVANA.....	5	293
<i>Affirmed: November 14, 1876.</i>		

	HUN, VOL.	PAGE.
COPPERMAN v. PEOPLE.....	1	15
<i>Judgment affirmed: June 9, 1874. (56 N. Y., 591.)</i>		
CORDELL, ADMINISTRATRIX, v. N. Y. C. AND H. R. R. Co.....	6	461
<i>Judgment reversed and new trial ordered: April 4, 1876. (64 N. Y., 535.)</i>		
<i>Also see decision of June 12, 1877.</i>		
COSTELLO v. DALE.....	1	489
<i>Appeal dismissed: February 2, 1875.</i>		
COULTER v. BOARD OF EDUCATION.....	4	569
<i>Judgment affirmed: December 9, 1875. (63 N. Y., 365.)</i>		
COX v. N. Y. CENT. AND HUD. R. R. Co.....	4	176
<i>Judgment reversed, and cause remitted to Supreme Court, with directions to proceed and hear the same upon the merits: December 14, 1875. (63 N. Y., 415.)</i>		
COX v. WIGHTMAN.....	4	799
<i>Affirmed: April 25, 1876.</i>		
CRANE v. TURNER.....	7	357
<i>Affirmed: December 5, 1876.</i>		
CROSBY v. CRAFTS.....	5	327
<i>Affirmed on opinion of court below: March 20, 1877.</i>		
CUMMINS v. AGRICULTURAL INS. CO..	5	554
<i>Reversed, new trial ordered: November 14, 1876.</i>		
CURTIS v. GOKEY.....	5	555
<i>Order granting new trial reversed, and judgment ordered on verdict, costs: January 30, 1877.</i>		
CURTIS v. McNAIR.....	6	550
<i>Order affirmed, and judgment absolute for plaintiff on stipulation: January 16, 1877.</i>		
CUSHMAN v. HORTON.....	1	601
<i>Judgment of General Term and decree of surrogate both reversed, and case remitted to surrogate: December 1, 1874. (59 N. Y., 149.)</i>		
CUSHMAN v. U. S. LIFE INS. CO.....	4	783
<i>Judgment reversed, and new trial granted: December 14, 1875. (63 N. Y., 404.) Also, see decision of June 5, 1877.</i>		
DALE v. BROOKLYN CITY, ETC., R. R. Co.....	1	146
<i>Judgment affirmed: March 23, 1875. (60 N. Y., 638.)</i>		
DALRYMPLE v. HILLENBRAND.....	2	488
<i>Judgment affirmed, April 27, 1875. (62 N. Y., 5.)</i>		
DANNAT v. MAYOR.....	6	88
<i>Affirmed: September 19, 1876.</i>		
DARLING v. BREWSTER.....	3	219
<i>Judgment affirmed: June 15, 1875. (62 N. Y., 630.)</i>		
DAY v. MAYOR.....	6	92
<i>Reversed, new trial ordered: September 19, 1876.</i>		

	HUN, VOL.	PAGE.
DEAN v. ÆTNA LIFE INS. CO. ....	2	358
<i>Judgment reversed, and new trial ordered: September 21, 1875.</i>		
<i>(62 N. Y., 642.)</i>		
DEAS v. WANDELL.....	1	120
<i>Judgment affirmed: November 24, 1874. (59 N. Y., 636.)</i>		
DECKER v. SALTSMAN .....	1	421
<i>Judgment affirmed: December 15, 1874. (59 N. Y., 275.)</i>		
DE LLAMOSAS v. DE LLAMOSAS .....	2	380
<i>Appeal dismissed, with costs: May 25, 1875. (62 N. Y., 618.)</i>		
DEMAREST v. WICKHAM .....	4	627
<i>Judgment affirmed: December 7, 1875. (63 N. Y., 320.)</i>		
DEVLIN v. CRARY.....	1	489
<i>Judgment affirmed: March 23, 1875. (60 N. Y., 635.)</i>		
DEWEY v. BOARD OF SUPERVISORS .....	2	392
<i>Judgment reversed, and judgment absolute ordered for defendant, with costs: June 15, 1875. (62 N. Y., 294.)</i>		
DE WITT v. ELMIRA NOBLES MFG. CO. ....	5	301
<i>Affirmed: June 20, 1876.</i>		
DICKSON v. FRAZER.....	9	191
<i>Affirmed: June 22, 1877.</i>		
DILLON v. PEOPLE.....	1	670
<i>Judgment affirmed: September 29, 1874. (58 N. Y., 669.)</i>		
DINSMORE v. ADAMS. . . . .	5	149
<i>Appeal dismissed: April 28, 1876.</i>		
DISHBROW v. MILLS.....	2	133
<i>Judgment affirmed: October 5, 1875. (62 N. Y., 604.)</i>		
DISTIN v. ROSE.....	7	88
<i>Affirmed: March 20, 1877.</i>		
DITCHETT v. SPUTTEN DUYVIL AND PORT MORRIS R. R. CO.....	5	165
<i>Reversed and new trial ordered: December 5, 1876.</i>		
DOLAN v. THE MAYOR, ETC.....	6	506
<i>Affirmed: December 22, 1876.</i>		
DOLAN v. THE MAYOR, ETC.....	8	440
<i>Affirmed: January 30, 1877.</i>		
DOLAN v. PEOPLE .....	6	232
<i>Affirmed: April 4, 1876. (64 N. Y., 485.)</i>		
DONOVAN v. WOODRUFF .....	1	439
<i>Order of General Term reversed, and judgment of nonsuit affirmed:</i>		
<i>December 14, 1875. (63 N. Y., 636.)</i>		
DUFFUNY v. FERGUSON.....	5	106
<i>Judgment reversed, new trial ordered: September 19, 1876. Motion for reargument denied, without costs: December 22, 1876.</i>		

	HUN, VOL.	PAGE.
DUNCAN v. KATEN.....	6	1
<i>Order affirmed: January 25, 1876. (64 N. Y., 625.)</i>		
DURYEA v. MAYOR.....	2	293
<i>Judgment reversed and new trial ordered: September 28, 1875. (62 N. Y., 592.)</i>		
EASTERLY v. BARBER.....	4	426
<i>Affirmed upon plaintiff's appeal, with costs of appeal to be paid by plaintiff to defendant upon the final determination of the action, if the defendant succeeds, and if the plaintiff succeeds to be set off against the plaintiff's costs. Judgment reversed upon defendant's appeal and a new trial granted, with costs of that appeal in this court, and costs in the Supreme Court to abide the event: June 20, 1876.</i>		
EDINGTON v. MUT. L. INS. CO. OF N. Y.....	5	1
<i>Reversed and new trial ordered: November 14, 1876.</i>		
ELMORE v. JAKES.....	2	180
<i>Judgment reversed and proceedings remitted to surrogate: February 9, 1875. (60 N. Y., 610.)</i>		
ENGH v. GREENEBAUM.....	2	136
<i>Affirmed: February 25, 1876. (64 N. Y., 642.)</i>		
ENGLISH v. PRESIDENT, ETC., DEL. AND HUD. CANAL CO.....	4	683
<i>Affirmed: June 20, 1876.</i>		
ENO v. THE MAYOR, ETC.....	7	320
<i>Reversed and demurrer overruled and judgment ordered for plaintiff, with costs, unless defendants shall stipulate to pay to plaintiff all the costs subsequent to the demurrer, and answer the complaint within thirty days after notice of filing the remittitur in the Supreme Court: January 16, 1877. Motion for reargument denied: February 6, 1877.</i>		
ESTES v. WORLD MUT. LIFE INS. CO.....	6	349
<i>Motion granted on payment of full costs of appeal, as if appeal had been argued, and ten dollars costs of motion, and the plaintiff stipulating that defendant may read evidence from printed case, subject to all legal objections and exceptions: December 19, 1876.</i>		
ESTEVEZ v. PURDY.....	6	46
<i>Order of General Term reversed, and judgment of Special Term affirmed, with costs: June 20, 1876.</i>		
EVANGELICAL LUTHERAN ST. JOHN'S ORPHAN HOME v. BUFFALO HYDRAULIC ASSOCIATION.....	4	419
<i>Affirmed: April 11, 1876. (64 N. Y., 561.)</i>		
EVANS v. U. S. LIFE INS. CO.....	3	587
<i>Affirmed and judgment absolute for defendant: February 25, 1876. (64 N. Y., 804.)</i>		
EVERTSEN v. NATIONAL BANK OF NEWPORT.....	4	692
<i>Reversed, new trial ordered: April 18, 1876.</i>		

	HUN, VOL.	PAGE.
EXCELSIOR SAVINGS BANK v. CAMPBELL.....	2	875
<i>Judgment affirmed: June 25, 1875. (63 N. Y., 687.)</i>		
FAIRCHILD v. FAIRCHILD.....	5	407
<i>Affirmed: March 28, 1876. (64 N. Y., 471.)</i>		
FALCONER v. BUFFALO AND JAMESTOWN R. R. Co.....	7	499
<i>Affirmed: May 22, 1877.</i>		
FAUCETT v. NICHOLS.....	2	521
<i>Reversed and new trial granted: March 21, 1876. (64 N. Y., 877.)</i>		
FERRY v. STEPHENS.....	5	100
<i>Order affirmed and judgment absolute for plaintiff: June 6, 1876.</i>		
FISHER v. BANTA.....	4	425
<i>Affirmed: September 19, 1876.</i>		
FISHER v. MAYOR (see 3 Hun, 648) ...	6	64
<i>Reversed, and new trial ordered: October 8, 1876.</i>		
FLYNN v. EQUITABLE LIFE ASSURANCE SOCIETY.....	7	387
<i>Reversed, and new trial ordered: December 19, 1876.</i>		
FLOOD v. MITCHELL.....	4	818
<i>Reversed, new trial: February 20, 1877.</i>		
FORD v. MAYOR.....	4	587
<i>Judgment affirmed: December 21, 1875. (63 N. Y., 640.)</i>		
FOSTER v. PEOPLE.....	3	6
<i>Judgment affirmed: November 23, 1875. (63 N. Y., 619.)</i>		
FOSTER v. VAN REED.....	5	321
<i>Reversed, new trial ordered: May 22, 1877.</i>		
FOWLER v. N. Y. GOLD EXCHANGE BANK..	6	186
<i>Reversed, and new trial ordered: October 6, 1876.</i>		
FRASER v. WYCKOFF.....	2	545
<i>Judgment affirmed: December 14, 1875. (63 N. Y., 445.)</i>		
FRYER v. ROCKAFELLER.....	4	300
<i>Order affirmed: November 30, 1875. (63 N. Y., 268.)</i>		
GALLUP v. BABSON.....	3	598
<i>Appeal dismissed: January 16, 1877.</i>		
GARDNER v. PEOPLE.....	3	222
<i>Judgment affirmed: June 22, 1875. (62 N. Y., 299.)</i>		
GERMAN AMERICAN BANK v. PITTSFORD AND ELMIRA COAL CO.....	9	205
SAME v. MORRIS RUN COAL CO.....	9	205
<i>Orders reversed and proceedings remitted for readjustment of costs, with costs of one appeal to appellant: March 20, 1877.</i>		
GERMANIA BANK v. DISTLER.....	4	633
<i>Affirmed: February 25, 1876. (64 N. Y., 642.)</i>		
GETTY v. SPAULDING.....	1	115
<i>Appeal dismissed: June 19, 1874. (58 N. Y., 636.)</i>		

	HUN, VOL.	PAGE.
GIBSON v. ERIE RAILWAY CO. ....	5	31
<i>Judgment reversed and new trial granted: December 21, 1875.</i> (63 N. Y., 449.)		
GILL v. PEOPLE.....	3	187
<i>Judgment affirmed: April 18, 1875. (60 N. Y., 643.)</i>		
GILMAN v. GILMAN.....	4	68
<i>Order affirmed: October 5, 1875. (63 N. Y., 610.)</i> <i>See decision of May 30, 1876.</i>		
GILMAN v. GILMAN.....	4	69
<i>Order affirmed, costs to be paid out of the estate: October 5, 1875.</i> (63 N. Y., 41.) <i>See decision of May 30, 1876.</i>		
GINNA v. SECOND AVENUE R. R. CO.....	8	494
<i>Affirmed: November 28, 1876.</i>		
GLACIUS v. BLACK.....	4	91
<i>Reversed, new trial ordered: December 22, 1876.</i>		
GLOVER v. THOMAS.....	2	158
<i>Reversed, and new trial granted: December 21, 1875. (63 N. Y., 642.)</i>		
GODFREY v. MOSER.....	8	218
<i>Appeal dismissed: February 8, 1876. (64 N. Y., 633.) Order granting</i> <i>new trial affirmed, and judgment absolute for defendant on stipulation:</i> <i>May 23, 1876. Motion for reargument denied, without costs: Septem-</i> <i>ber 19, 1876.</i>		
GODFREY v. PEOPLE.....	5	369
<i>Judgment reversed, and new trial granted: November 28, 1875.</i> (63 N. Y., 207.)		
GOELET v. McMANUS.....	1	306
<i>Order affirmed on opinion of DAVIS, P. J., in court below: November</i> <i>24, 1874. (59 N. Y., 634.)</i>		
GOLDENBURG v. HOFFMAN AND OTHERS.....	7	324
<i>Order affirmed, and judgment absolute for defendant on stipulation, with</i> <i>costs: April 17, 1877.</i>		
GOSMAN v. CRUGER.....	7	60
<i>Affirmed: March 20, 1877.</i>		
GOURLEY v. CAMPBELL.....	6	218
<i>Judgment reversed: judgment for defendant, costs to be paid out of fund:</i> <i>May 23, 1876.</i>		
GOURLEY v. CAMPBELL.....	6	218
<i>Remittitur to be corrected, by making the judgment without costs to either</i> <i>party as against the other: September 26, 1876.</i>		
GRAY v. GREEN.....	4	77
<i>Appeal dismissed: June 6, 1876.</i>		



	HUN, VOL.	PAGE.
GREEN v. ELDRED .....	4	276
<i>Affirmed: April 25, 1876.</i>		
GREEN v. GREEN .....	7	492
<i>Affirmed: May 22, 1877.</i>		
GREENE v. DEAL.....	4	703
<i>Order of General Term reversed, and that of Special Term modified so as to divide the surplus money equally between the two mortgagees, costs of appellants at General Term and in this court to be first paid out of fund. Respondents to recover no costs: February 15, 1876. (64 N. Y., 220.)</i>		
GREENE v. MAYOR.....	1	24
<i>Judgment reversed, and new trial granted: March 30, 1875. (60 N. Y., 303.)</i>		
GREEN v. THOMAS. ....	4	809
<i>Affirmed on opinion of court below: January 18, 1877.</i>		
GREEN POINT SUGAR CO. v. WHITING.....	7	44
<i>Affirmed: April 17, 1877.</i>		
GRIERSON v. MASON.....	1	118
<i>Judgment affirmed: April 13, 1875. (60 N. Y., 394.)</i>		
GROCERS' BANK OF NEW YORK v. PENFIELD .....	7	279
<i>Order granting new trial affirmed, and judgment absolute for plaintiff on stipulation: May 22, 1877.</i>		
GUARDIAN MUT. LIFE INS. CO. v. KASHOW.....	3	616
<i>Order of General Term reversed, and judgment on report of referee affirmed, with costs: September 19, 1876.</i>		
HACKLEY v. DRAPER.....	2	523
<i>Judgment affirmed: February 9, 1875. (60 N. Y., 88.)</i>		
HALLOCK v. DOMINY.....	7	52
<i>Order granting new trial reversed and judgment of nonsuit affirmed: April 10, 1877.</i>		
HAMMETT v. BARNARD ...	1	198
<i>Judgment affirmed: May 25, 1875. (62 N. Y., 615.)</i>		
HARRINGTON v. MAYOR.....	10	248
<i>Affirmed: June 12, 1877.</i>		
HARRIS v. EQUITABLE LIFE ASS. SOCIETY.....	3	724
<i>Order affirmed and judgment absolute for defendant on stipulation: February 15, 1876. (64 N. Y., 196.)</i>		
HARRIS v. PEOPLE.....	4	1
<i>Affirmed: February 8, 1876. (64 N. Y., 148.)</i>		
HARTNETT v. WANDALL .....	2	552
<i>Judgment reversed and decree of surrogate affirmed, with costs: April 13, 1875. (60 N. Y., 347.)</i>		
HASCALL v. LIFE ASSOCIATION OF AMERICA.....	5	151
<i>Affirmed on opinion of court below: April 25, 1876.</i>		

	HUN, VOL.	PAGE.
HAUCK v. CRAIGHEAD.....	8	257
<i>Order of General Term granting new trial reversed, and judgment of circuit affirmed: December 5, 1876.</i>		
HAYCROFT v. LAKE SHORE AND M. S. R. R. Co.....	2	489
<i>Affirmed, February 15, 1876. (64 N. Y., 686.)</i>		
HAYS v. MILLER.....	6	320
<i>Affirmed: June 12, 1877.</i>		
HEERMANS v. ELLSWORTH.....	8	473
<i>Affirmed: February 8, 1876. (64 N. Y., 150.)</i>		
HEERMANS v. ROBERTSON.....	8	467
<i>Affirmed: March 21, 1876. (64 N. Y., 332.)</i>		
HEINEMAN v. HEARD.....	2	324
<i>Judgment reversed and new trial ordered: September 21, 1875. (63 N. Y., 448.)</i>		
HELMS v. GOODWILL.....	2	410
<i>Order of General Term reversed and judgment of Special Term affirmed: March 21, 1876. (64 N. Y., 642.)</i>		
HEMENWAY v. WILSON.....	1	721
<i>Judgment affirmed: November 24, 1874. (59 N. Y., 633.)</i>		
HETZEL v. BARBER.....	6	534
<i>Affirmance of so much of judgment as is appealed from by plaintiff, and reversal of so much as is appealed from by defendant, and ordering judgment for the defendant for the whole premises, with costs: March 20, 1877.</i>		
HEWLETT v. WOOD.....	1	478
HEWLETT v. WOOD.....	8	736
<i>Appeals dismissed, without costs: May 25, 1875. (62 N. Y., 475.)</i>		
HIGGINS v. NEWTOWN AND FLUSHING R. R. Co.....	8	611
<i>Affirmed: April 18, 1876.</i>		
HIGGINS v. PEOPLE.....	1	307
<i>Judgment affirmed: September 29, 1874. (58 N. Y., 377.)</i>		
HILDERBRAND v. PEOPLE.....	1	19
<i>Judgment affirmed: April 28, 1874. (56 N. Y., 394.)</i>		
HILTON v. BENDER.....	2	1
<i>Reversed and new trial ordered: March 20, 1877.</i>		
HINTERMISTER v. FIRST NATIONAL BANK.....	8	345
<i>Order of General Term and judgment of Special Term reversed and new trial granted, costs to abide event, unless plaintiff stipulates to reduce recovery to \$160 for penalty, and in case he so stipulates judgment affirmed for that amount without costs to either party in this court: February 15, 1876. (64 N. Y., 212.)</i>		
HOFFMAN v. UNION FERRY Co.....	4	274
<i>Affirmed: February 13, 1877.</i>		

	HUN, VOL.	PAGE.
HOLDEN v. BURNHAM.....	2	678
<i>Judgment affirmed: November 9, 1875. (63 N. Y., 74.)</i>		
HOLLOWAY v. STEPHENS.....	1	306
<i>Appeal dismissed: September 29, 1874. (58 N. Y., 670.)</i>		
HOLMES v. PETTENGILL.....	1	316
<i>Judgment affirmed: April 20, 1875. (60 N. Y., 646.)</i>		
HOLYOKE v. ADAMS.....	1	223
<i>Appeal dismissed: December 8, 1874. (59 N. Y., 234.)</i>		
HOME INS. CO. v. WATSON.....	1	643
<i>Judgment reversed and judgment ordered for plaintiff on bond, with costs.</i>		
<i>Motion for reargument denied: December 22, 1874. (59 N. Y., 390.)</i>		
<i>Motion for reargument denied, with costs: January 26, 1875.</i>		
HOPPOCK v. TUCKER.....	1	133
<i>Judgment affirmed: December 8, 1874. (59 N. Y., 202.)</i>		
HOTCHKISS v. PLATT.....	7	56
<i>Order affirmed: April 28, 1876.</i>		
HOWARD v. MOOT.....	2	475
<i>Affirmed: February 22, 1876. (64 N. Y., 262.)</i>		
HOWELL v. VAN SICKLIN. (See 6 Hun, 115.).....	8	524
<i>Affirmed: June 5, 1877.</i>		
<i>SAME v. SAME: Order affirmed: June 5, 1877.</i>		
<i>SAME v. SAME: Appeal dismissed: June 5, 1877.</i>		
INDIANAPOLIS, PERU, ETC., R. R. CO. v. TYNG.....	2	311
<i>Judgment affirmed: January 18, 1876. (63 N. Y., 653.)</i>		
<i>Motion for reargument denied, with ten dollars costs: March 28, 1876.</i>		
INGERSOLL v. N. Y. C. AND H. R. R. R. CO.....	4	277
<i>Affirmed: April 25, 1876.</i>		
INNES v. PURCELL.....	1	318
<i>Order affirmed: September 29, 1874. (58 N. Y., 388.)</i>		
JACOBOWSKY v. PEOPLE.....	6	524
<i>Affirmed on opinion of DANIELS, J., in court below: April 8, 1876.</i>		
<i>(64 N. Y., 659.)</i>		
JAMES v. HAMILTON.....	2	630
<i>Judgment affirmed: November 9, 1875. (63 N. Y., 616.)</i>		
JENKS v. BROWN.....	4	128
<i>Order affirmed and judgment absolute for plaintiff on stipulation, with costs: May 30, 1876.</i>		
JOHNSON v. FIRST NATIONAL BANK OF HOBOKEN.....	6	124
<i>Affirmed on opinion of DANIELS, J., in court below: January 20, 1877.</i>		
JONES v. SMITH.....	8	351
<i>Reversed, new trial ordered: February 8, 1876. (64 N. Y., 180.)</i>		

	HUN, VOL.	PAGE.
KELLAM v. MCKINSTRY AND OTHERS. . . . .	6	381
<i>Affirmed: April 10, 1877.</i>		
KENDALL v. BRILL . . . . .	4	664
<i>Affirmed: February 27, 1876. (64 N. Y., 638.)</i>		
KENT v. KENT . . . . .	1	529
<i>Judgment reversed and new trial ordered: September 21, 1875.</i> <i>(62 N. Y., 580.)</i>		
KERRIGAN v. FORCE . . . . .	9	185
<i>Order affirmed: February 6, 1877.</i>		
KIERSTED AND OTHERS v. ORANGE AND ALEXANDRIA R. R. CO. AND OTHERS . . . . .	1	151
<i>See opinion of ANDREWS, J., in this case, of April 17, 1877.</i>		
KILBURN v. PARTRIDGE . . . . .	4	631
<i>Affirmed: June 6, 1876.</i>		
KILLER v. BURLINGTON AND MO. RIVER R. R. CO. . . . .	11	
<i>Order affirmed: June 19, 1877.</i>		
KING v. GALVIN . . . . .	4	258
<i>Appeal dismissed, with costs: June 1, 1875. (62 N. Y., 238.)</i>		
KING v. N. Y. C. AND H. R. R. CO. . . . .	4	769
<i>Reversed and new trial ordered: May 23, 1876.</i>		
KING v. SARRIA . . . . .	7	167
<i>Affirmed: March 20, 1877.</i>		
KINGSTON BANK v. ELTINGE . . . . .	5	653
<i>Affirmed: May 23, 1876.</i>		
KIP v. N. Y. AND HARLEM R. R. CO. . . . .	6	24
<i>Affirmed: November 14, 1876.</i>		
KIRKLAND v. DINSMORE . . . . .	3	46
<i>Judgment reversed, and new trial granted: May 25, 1875.</i> <i>(62 N. Y., 171.)</i>		
KLINE v. QUEENS INS. CO. . . . .	7	267
<i>Affirmed: April 10, 1877.</i>		
KROM v. LEVY . . . . .	1	171
<i>Appeal dismissed, without costs: February 16, 1875. (60 N. Y., 126.)</i>		
KYLE v. KYLE . . . . .	3	458
<i>Affirmed as to dower, and reversed as to claim of executors, and proceed- ings remitted for rehearing on latter claim by surrogate, costs to abide his order: December 5, 1876.</i>		
LANCEY v. CLARK . . . . .	3	575
<i>Affirmed: February 15, 1876. (64 N. Y., 209.)</i>		
LATHROP v. BRAMHALL . . . . .	3	394
<i>Affirmed, March 21, 1876. (64 N. Y., 365.)</i>		
LATHROP v. DUNLOP . . . . .	4	213
<i>Judgment affirmed: October 5, 1875. (63 N. Y., 610.)</i>		

	HUN, VOL.	PAGE.
LAWRENCE, EXR., v. LINDSAY .....	7	641
<i>Judgment of Supreme Court and decree of surrogate reversed, and proceedings remitted for a rehearing by surrogate, costs of this court to be paid out of estate: January 16, 1877.</i>		
LAWTON v. GREEN .....	5	157
<i>Judgment modified by deducting the amount awarded the respondent for costs and expenses of the reference, and limiting the allowance to \$750 as and for the damages, by reason of the injunction, without costs to either party in this court: March 21, 1876. (64 N. Y., 326.)</i>		
LENAHAN v. PEOPLE .....	8	164
<i>Judgment affirmed on opinion of DANIELS, J., in court below: June 1, 1875. (62 N. Y., 623.)</i>		
LENTEN v. GUNTHER .....	4	142
<i>Affirmed: February 15, 1876. (64 N. Y., 634.)</i>		
LESLIE v. KNICKERBOCKER LIFE INS. CO. ....	2	616
<i>Judgment affirmed: October 5, 1875. (63 N. Y., 27.)</i>		
LIDDELL v. PATON .....	7	195
<i>Appeal dismissed: November 28, 1876.</i>		
LINDSAY v. PEOPLE .....	5	104
<i>Judgment affirmed: November 9, 1875. (63 N. Y., 143.)</i>		
LIVINGSTON v. MURRAY .....	4	619
<i>Modified so as to authorize the appellant at any time to apply to the Supreme Court to have the fund delivered to her, upon her giving security as mentioned in the opinion, and judgment as thus modified affirmed, and the costs of both parties in this court must be paid out of the fund: February 20, 1877.</i>		
LUCE v. DUNHAM .....	7	202
<i>Reversed as to Sarah Luce, and decree of surrogate modified, by awarding to her one-fourth of the residuary estate, free from all claims of the widow, costs of both parties in this court to be paid from share of residuary estate going to appellant: March 20, 1877.</i>		
LUDLOW v. DOLE .....	1	715
<i>Judgment affirmed: May 25, 1875. (62 N. Y., 617.)</i>		
LUSK v. CAMPBELL .....	8	607
<i>Judgment affirmed: November 9, 1875. (63 N. Y., 619.)</i>		
LUTES v. BRIGGS .....	5	67
<i>Reversed and new trial granted, March 21, 1876. (64 N. Y., 404.)</i>		
MAHER v. HIBERNIA INS. CO. OF OHIO .....	6	353
<i>Affirmed: November 14, 1876.</i>		
MAHONEY v. PEOPLE .....	3	202
<i>Judgment affirmed: January 26, 1875. (59 N. Y., 659.)</i>		
MALONE v. HATHAWAY .....	8	553
<i>Reversed, new trial granted: January 18, 1876. (64 N. Y., 5.)</i>		

	HUN, VOL.	PAGE.
MANUFACTURERS' NATIONAL BANK v. COX .....	2	572
<i>Judgment affirmed: February 2, 1875. (59 N. Y., 659.)</i>		
MARCH v. FIRST NAT. BANK OF MOBILE .....	4	466
<i>Affirmed, with costs: March 21, 1876. (64 N. Y., 645.)</i>		
MARCUS v. ST. LOUIS MUT. LIFE INS. CO. ....	7	5
<i>Reversed, new trial ordered: February 13, 1877.</i>		
MARKEY v. BREWSTER .....	10	16
<i>Order granting new trial affirmed and judgment absolute for plaintiff on stipulation, on opinion of court below: June 19, 1877.</i>		
MARKE v. KING .....	1	485
<i>Affirmed: February 8, 1876. (64 N. Y., 638.)</i>		
MARSDEN v. CORNELL .....	2	449
<i>Judgment affirmed: June 1, 1875. (63 N. Y., 215.)</i>		
MARSH v. CITY OF BROOKLYN .....	2	142
<i>Judgment reversed and new trial granted: December 15, 1874. (59 N. Y., 280.)</i>		
MARSH v. DODGE .....	4	278
<i>Reversed, new trial granted: September 19, 1876. Motion for reargument denied: December 22, 1876.</i>		
MARSH v. TOWN OF LITTLE VALLEY .....	1	554
<i>Affirmed: February 1, 1876. (64 N. Y., 112.)</i>		
MARSTON v. SWEET .....	4	153
<i>Reversed and new trial ordered: May 23, 1876.</i>		
MARTIN v. WINDSOR HOTEL CO. ....	10	304
<i>Appeal dismissed: June 5, 1877.</i>		
MARTINE v. LOWENSTEIN .....	6	225
<i>Appeal dismissed: February 13, 1877.</i>		
MASON v. PARTRIDGE .....	4	631
<i>Affirmed: June 6, 1876.</i>		
MASSOTH, ADMRX., v. DEL. AND HUDSON CANAL CO. ....	6	314
<i>Affirmed: April 4, 1876. (64 N. Y., 524.)</i>		
MAXIMILLIAN v. MAYOR .....	2	263
<i>Judgment affirmed: May 25, 1875. (62 N. Y., 160.)</i>		
MAYER v. FREIDMAN .....	7	218
<i>Affirmed on opinion of court below: March 27, 1877.</i>		
MAYER v. MAYOR .....	4	673
<i>Judgment affirmed: December 21, 1875. (63 N. Y., 455.)</i>		
MAYOR v. GENET .....	4	487
<i>Order affirmed: December 21, 1875. (63 N. Y., 646.)</i>		
MATTER OF AGNEW .....	4	435
<i>Order affirmed: December 14, 1875. (63 N. Y., 635.)</i>		

	HUN, VOL.	PAGE.
MATTER OF ANDERSON.....	2	377
<i>Order of General Term affirmed, in as far as it reverses order of Special Term, and modified by ordering a rehearing at Special Term: April 20, 1875. (60 N. Y., 457.)</i>		
MATTER OF BRADY .....	8	437
<i>Affirmed: April 10, 1877.</i>		
MATTER OF BURKE .....	2	281
<i>Order of General Term modified by remanding proceedings for retrial at Special Term, costs to abide event: June 1, 1875. (62 N. Y., 224.)</i>		
MATTER OF CITY OF BROOKLYN v. LOTT.....	2	628
<i>Order affirmed: April 18, 1875. (60 N. Y., 398.)</i>		
MATTER OF CONWAY .....	4	43
<i>Order of General Term modified so as to send case back to Special Term for rehearing, and as thus modified, affirmed without costs: September 21, 1875. (62 N. Y., 504.)</i>		
MATTER OF DEANSVILLE CEMETERY ASSOCIATION .....	5	482
<i>Order of General Term reversed and application denied: September 14, 1876.</i>		
MATTER OF DEPARTMENT OF PUBLIC PARKS .....	2	374
<i>Order of General Term affirmed, with costs: April 6, 1875. (60 N. Y., 319.)</i>		
MATTER OF GARDNER .....	6	67
<i>Order affirmed: December 19, 1876. Assessment reduced to \$3,000, one-half the assessed value of the premises, and interest from the date of this order, and as reduced affirmed without costs to either party as against the other: May 22, 1877.</i>		
MATTER OF HUDSON AVENUE.....	2	580
<i>Appeal dismissed: April 27, 1875. (62 N. Y., 611.)</i>		
MATTER OF INGRAHAM.....	4	495
<i>Order affirmed: June 22, 1875. (64 N. Y., 310.)</i>		
<i>Motion to amend remittitur so as to allow the court below to reopen the case granted: February 25, 1876. (64 N. Y., 310.)</i>		
MATTER OF KELLY .....	3	636
<i>Judgment affirmed: May 25, 1875. (62 N. Y., 198; see 59 N. Y., 595.)</i>		
MATTER OF KETeltas.....	2	221
<i>Order of General Term modified by remanding proceedings for retrial at Special Term: June 1, 1875. (62 N. Y., 624.)</i>		
MATTER OF KIERNAN.....	3	623
<i>Order of General Term reversed and order of Special Term affirmed, with costs: September 21, 1875. (62 N. Y., 457.)</i>		
MATTER OF KINGSBRIDGE ROAD .....	4	599
<i>Order affirmed: September 21, 1875. (62 N. Y., 645.)</i>		

	HUN, VOL.	PAGE.
MATTER OF LEVY.....	4	501
<i>Order affirmed: December 14, 1875. (63 N. Y., 637.)</i>		
MATTER OF LITTLE.....	3	215
<i>Order of General Term reversed and order of Special Term affirmed, with costs: April 6, 1875. (60 N. Y., 343.)</i>		
MATTHEWS v. MEYBERG.....	4	78
<i>Judgment affirmed: January 18, 1876. (63 N. Y., 656.)</i>		
MATTER OF N. Y. C. AND H. R. R. R. Co. v. METROPOLITAN GAS-LIGHT Co.....	5	201
<i>Order affirmed: December 7, 1875. (63 N. Y., 328.)</i>		
MATTER OF N. Y. C. AND H. R. R. R. Co. v. CUNNINGHAM.....	5	105
<i>Appeal dismissed: January 25, 1876. (64 N. Y., 60.)</i>		
MATTER OF N. Y. PROT. EPISCOPAL PUBLIC SCHOOL.....	8	457
<i>Affirmed on opinion of FOLGER, J., in In re Zoborowski: January 16, 1877.</i>		
MATTER OF PEUGNET.....	5	434
<i>Order affirmed: December 5, 1876.</i>		
MATTER OF PEUGNET.....	5	434
<i>Motion for reargument denied, with ten dollars costs: March 30, 1877.</i>		
MATTER OF PEUGNET.....	5	434
<i>Motion to correct remittitur denied, without costs: June 22, 1877.</i>		
MATTER OF PHILLIPS.....	2	212
<i>Order of General Term reversed, and order of Special Term affirmed, with costs: February 2, 1875. (60 N. Y., 16.)</i>		
MATTER OF PROSPECT PARK v. CONEY ISLAND RAILROAD COMPANY TO ACQUIRE TITLE TO LANDS IN KINGS COUNTY OF WILLIAM MOYNAHAN AND OTHERS.....	8	80
<i>Orders affirmed, with costs, one appeal only: November 21, 1876.</i>		
MATTER OF RAE.....	5	455
<i>Appeal dismissed: December 21, 1875. (63 N. Y., 645.)</i>		
MATTER OF ROBERTS ...	10	258
<i>Order of General Term reversed, and appeal to that court dismissed without costs: May 22, 1877.</i>		
MATTER OF ST. JOSEPH'S ASYLUM.....	10	113
<i>Order affirmed. Assessment No. 2 to draw interest only from the date of the order of Special Term, without costs, in the Court of Appeals to either party as against the other: April 17, 1877.</i>		
MATTER OF VOORHIS.....	3	212
<i>Judgment affirmed: June 25, 1875. (62 N. Y., 637.)</i>		
MATTER OF WILLIAMSON.....	3	65
<i>Judgment affirmed: May 25, 1875. (62 N. Y., 618.)</i>		
MCDONALD v. THE MAYOR, ETC.....	1	719
<i>Affirmed: December 23, 1876.</i>		



	HUN, VOL.	PAGE.
MCDONNELL v. BAUENDAHL .....	4	265
<i>Affirmed: February 22, 1876. (64 N. Y., 638.)</i>		
MCGRATH v. N. Y. C. AND H. R. R. R. Co. ....	1	487
<i>Judgment reversed, and new trial ordered: January 19, 1875. Motion for reargument denied: February 9, 1875. (59 N. Y., 468.)</i>		
MCLEAN v. FREEMAN .....	9	246
<i>Affirmed: June 5, 1877.</i>		
MCLEAN v. MCLEAN .....	3	395
<i>Judgment affirmed: June 8, 1875. (62 N. Y., 627.)</i>		
MEADS v. WESTCHESTER FIRE INS. CO. ....	3	608
<i>Order affirmed, and judgment absolute for defendant on stipulation: March 21, 1876. (64 N. Y., 453.)</i>		
MENEELY v. MENEELY .....	1	367
<i>Order affirmed, and judgment absolute ordered for defendant, with costs: September 21, 1875. (62 N. Y., 427.)</i>		
MERCHANTS' BANK OF CANADA v. HOLLAND. ....	4	420
<i>Affirmed on opinion of referees and General Term: June 20, 1876.</i>		
MERCHANTS' BANK OF CANADA v. UNION R. R. AND TRANS. CO. ....	8	249
<i>Affirmed, April 24, 1877.</i>		
MERCHANTS' NATIONAL BANK v. BOARD OF SUPERVISORS .....	3	156
<i>Judgment affirmed: June 15, 1875. (62 N. Y., 629.)</i>		
MILLARD v. MULLEN. ....	5	572
<i>Modified by adding the \$322.50 which was deducted from Bell's claims, and, as modified, affirmed, without costs to either party as against the other in this court: February 6, 1877.</i>		
MILLER v. BARBER .....	4	802
<i>Affirmed September 19, 1876.</i>		
MILLER v. BRENHAM .....	7	380
<i>Affirmed January 16, 1877.</i>		
MILLER v. COATES .....	2	156
<i>Judgment of General Term reversed, and order of Special Term affirmed, with costs in Supreme Court and Court of Appeals: April 18, 1876.</i>		
MILLER v. IRISH .....	3	352
<i>Judgment affirmed: January 18, 1876. (63 N. Y., 652.)</i>		
MILLIMAN v. N. Y. C. AND H. R. R. R. Co. ....	4	409
<i>Affirmed: June 18, 1876.</i>		
MITCHELL, ADMR., v. N. Y. C. AND H. R. R. R. Co. ....	2	585
<i>Affirmed: April 4, 1876. (64 N. Y. 655.)</i>		
MOORES v. LUNT .....	1	650
<i>Judgment affirmed: April 27, 1875. (60 N. Y., 649.)</i>		
MORAN v. DARRIN .....	1	490
<i>Judgment affirmed: March 28, 1875. (60 N. Y., 637.)</i>		

	HUN, VOL.	PAGE.
MORRISON v. N. Y. C. AND H. R. R. Co.....	4	424
<i>Judgment affirmed: December 21, 1875. (63 N. Y., 643.)</i>		
MORSE v. PURVIS .....	2	542
<i>Affirmed: January 16, 1877.</i>		
MORSE v. GLEASON.....	2	31
<i>Affirmed: February 15, 1876. (64 N. Y., 64.)</i>		
MORTON v. WEIR.....	5	177
<i>Affirmed: June 22, 1877.</i>		
MOTT v. MOTT.....	8	474
<i>Modified by releasing appellant Cossitt from the purchase of lots 6, 7, 8 and 9, and compelling him to complete the purchase of lots 4, 5, 10, 11, 12 and 18, and releasing appellant Higgins from his purchase of lots 19, 20, 21, 22, 35, 36, 37, 38 and 39, and compelling him to complete the purchase of lots 48 and 49, and, as modified, affirmed, without costs to either party as against the other in this court: January 23, 1877.</i>		
MOWRY v. SANBORN .....	7	380
<i>Reversed, new trial ordered: January 16, 1877.</i>		
MULLALY v. MAYOR.....	3	661
<i>Judgment affirmed: June 25, 1875. (62 N. Y., 636.)</i>		
MULLER v. MAYOR ..	5	283
<i>Judgment reversed and new trial granted: December 7, 1875. (63 N. Y., 353.)</i>		
MUNDORFF v. MUNDORFF .....	1	41
<i>Appeal dismissed: November 24, 1874. (59 N. Y., 635.)</i>		
MURDOCK v. WARD .....	8	9
<i>Judgment reversed and judgment ordered declaring the child of C. F. Ward entitled to the fund in controversy to the exclusion of the widow, costs of all parties to be paid out of the fund: November 28, 1876.</i>		
MURPHY v. PEOPLE.....	4	102
<i>Judgment affirmed: January 18, 1876. (63 N. Y., 590.)</i>		
MURRAY v. CHURCH .....	1	49
<i>Judgment affirmed: June 9, 1874. (58 N. Y., 621.)</i>		
NASH v. MANUFACTURERS AND TRADERS' BANK OF BUFFALO.....	5	568
<i>Reversed and new trial ordered: February 18, 1877.</i>		
<i>Motion for reargument denied, with ten dollars costs: June 22, 1877.</i>		
NELSON v. MAYOR.....	5	190
<i>Judgment reversed and new trial granted: January 18, 1876. (63 N. Y., 535.)</i>		
NICHOLAS v. N. Y. C. AND H. R. R. Co.....	4	327
<i>Motion to dismiss appeal granted on payment of costs of appeal, and ten dollars costs of motion: October 6, 1876.</i>		
NICHOLSON v. WAFUL.....	6	655
<i>Order granting new trial reversed, and judgment on report of referees affirmed: June 19, 1877.</i>		

	HUN. VOL.	PAGE.
NICKELSON v. WILSON.....	1	615
<i>Judgment reversed and new trial granted: April 13, 1875.</i>		
<i>(60 N. Y., 362.)</i>		
NORTON v. MALLORY.....	1	499
<i>Judgment affirmed: December 14, 1875. (63 N. Y., 484.)</i>		
OBERLANDER v. ROESWOG (SPIESS).....	4	665
<i>Order of General Term reversed, and judgment entered on report of referee affirmed: December 14, 1875. (63 N. Y., 634.)</i>		
ODELL v. MONTROSS.....	6	155
<i>Judgment of General Term reversed and that of Special Term affirmed, without costs to either party in this court: February 20, 1877.</i>		
ORGAN v. STEWART.....	1	411
<i>Judgment reversed and new trial granted: April 13, 1875.</i>		
<i>(60 N. Y., 413.)</i>		
O'REILLY v. GUARDIAN MUT. INS. CO.....	1	460
<i>Judgment reversed and new trial granted: February 23, 1875.</i>		
<i>(60 N. Y., 169.)</i>		
OSBORN v. KEECH.....	3	223
<i>Affirmed: February 25, 1876. (64 N. Y., 640.)</i>		
<i>Motion for reargument denied, with ten dollars costs: April 4, 1876.</i>		
OSGOOD v. TOOLE.....	1	167
<i>Judgment affirmed: April 20, 1875. (60 N. Y., 475.)</i>		
PAINE v. MCCARTHY.....	1	78
<i>Motion to dismiss appeal granted, with costs: January 19, 1875.</i>		
PAYNE v. BURNHAM.....	21	143
<i>Judgment reversed and new trial granted: May 25, 1875. (62 N. Y., 69.)</i>		
PARTRIDGE v. EATON.....	3	533
<i>Affirmed: December 21, 1875. (63 N. Y., 482.)</i>		
* PATTERSON v. PATTERSON.....	1	323
<i>Judgment modified, and as modified affirmed: January 26, 1875.</i>		
<i>(59 N. Y., 574.)</i>		
PEOPLE v. CHALMERS.....	1	688
<i>Judgment affirmed: February 23, 1875. (60 N. Y., 154.)</i>		
PEOPLE v. EYERS.....	3	716
<i>Order affirmed: November 30, 1875. (63 N. Y., 625.)</i>		
PEOPLE v. FLANAGAN.....	5	187
<i>Affirmed: May 23, 1876.</i>		
PEOPLE v. HORTON.....	5	516
<i>Motion to dismiss appeal denied: January 25, 1876. (64 N. Y., 58.)</i>		
PEOPLE v. HORTON.....	5	516
<i>Order granting new trial affirmed, and judgment absolute for defendant on stipulation: April 11, 1876. (64 N. Y., 610.)</i>		

	HUN, VOL.	PAGE.
PEOPLE v. HOWELL.....	5	620
<i>Affirmed, on opinion of LEARNED, J., in court below : March 20, 1877.</i>		
PEOPLE v. N. Y. AND STATEN ISLAND FERRY CO.....	7	105
<i>Modified by striking out allowance for extra costs, and as modified affirmed, without costs to either party : January 16, 1877.</i>		
PEOPLE v. SMITH.....	9	446
<i>Reversal of Supreme Court judgment and affirmance of General Sessions : March 27, 1877.</i>		
PEOPLE v. TWEED.....	5	382
<i>Appeal dismissed : November 16, 1875. (63 N. Y., 202; see, also, 63 N. Y., 194.)</i>		
PEOPLE EX REL. ACADEMY OF THE SACRED HEART v. COMMISSIONERS OF TAXES.....	6	109
<i>Affirmed : April 4, 1876. (64 N. Y., 656.)</i>		
PEOPLE EX REL. ATKINSON v. TOMPKINS.....	6	299
<i>Order of General Term reversed, and order of Special Term affirmed : January 25, 1876. (64 N. Y., 53.)</i>		
PEOPLE EX REL. BROOKLYN PARK COMMISSIONERS v. CITY OF BROOKLYN.....	3	596
<i>Judgment affirmed, with costs : April 6, 1875. (60 N. Y., 642.)</i>		
PEOPLE EX REL. BURROUGHS v. BRINCKERHOFF.....	7	668
<i>So much of the order reversed as gives costs against Potter, and affirmed as to residue, with costs against Burroughs only : January 23, 1877.</i>		
PEOPLE EX REL. CONWAY v. SUPERVISORS OF LIVINGSTON.....	6	572
<i>Reversed, and judgment for plaintiffs on demurrer : January 16, 1877.</i>		
PEOPLE EX REL. CORWIN v. WALTER.....	2	385
<i>Motion to open default granted on payment of ten dollars costs of remittitur, and ten dollars costs of motion : April 25, 1876.</i>		
PEOPLE EX REL. CORWIN v. WALTER.....	2	385
PEOPLE EX REL. HESS v. WALTER.....	2	385
PEOPLE EX REL. MENTZ v. WALTER.....	2	385
PEOPLE EX REL. STOCKWELL v. WALTER.....	2	385
<i>Reversal of judgment removing commissioners from office and setting aside their proceedings and the appeal from the other judgments and parts of judgments dismissed; no costs : February 13, 1877.</i>		
PEOPLE EX REL. DEMAREST v. FAIRCHILD.....	8	334
<i>Order affirmed : November 21, 1876.</i>		
PEOPLE EX REL. DEVLIN v. ASTEN.....	4	461
<i>Order affirmed on opinion of General Term : April 11, 1876. (64 N. Y., 661.)</i>		
PEOPLE EX REL. DONOVAN v. CONNOR.....	6	250
<i>Writ of error quashed, without costs : April 4, 1876. (64 N. Y., 481.)</i>		

	HUN, VOL.	PAGE.
PEOPLE EX REL. DOYLE v. GREEN .....	3	755
<i>Order affirmed on opinion of court below : June 1, 1875. (62 N. Y., 624.)</i>		
PEOPLE EX REL. FROST v. WILSON .....	3	437
<i>Judgment reversed, and new trial granted : May 25, 1875. (62 N. Y., 186.)</i>		
PEOPLE EX REL. GALLATIN NATIONAL BANK v. COMRS. OF TAXES,	8	536
<i>Affirmed : December 19, 1876.</i>		
PEOPLE EX REL. GILLIES v. SUFFERN .....	6	304
<i>Affirmed : January 20, 1877.</i>		
PEOPLE EX REL. GRISSLER v. STUYVESANT .....	1	102
<i>Judgment affirmed : September 22, 1874. (58 N. Y., 323.)</i>		
PEOPLE EX REL. HATCH AND OTHERS v. LAKE SHORE AND M. S. R. R. Co. ....	11	1
<i>Appeal dismissed : June 19, 1877.</i>		
PEOPLE EX REL. HEISER v. ASTEN .....	6	228
PEOPLE EX REL. MEYER v. ASTEN .....	6	228
<i>Affirmed : February 15, 1876. (64 N. Y., 634.)</i>		
PEOPLE EX REL. HOWLETT v. MAYOR OF SYRACUSE .....	2	433
<i>Judgment reversed and proceedings and assessment of commissioners affirmed : November 30, 1875. (63 N. Y., 291.)</i>		
PEOPLE EX REL. JERMAIN v. THAYER .....	4	798
<i>Order affirmed : December 7, 1875. (63 N. Y., 348.)</i>		
PEOPLE EX REL. KILMER v. McDONALD (see 2 Hun, 70 and 601) .....	4	187
<i>Motion for reargument denied and order of this court modified by reversing so much of the judgment of the Supreme Court as awards costs, and affirming the residus of the judgment without costs in this court to either party, and remittitur amended accordingly : June 12, 1877.</i>		
PEOPLE EX REL. MANN v. MOTT .....	2	672
<i>Judgment affirmed : April 27, 1875. (60 N. Y., 649.)</i>		
PEOPLE EX REL. MILLER v. BOARD OF POLICE COMMISSIONERS .....	6	229
<i>Order of Supreme Court and of Board of Police Commissioners reversed, and proceedings remitted for rehearing by the board : December 5, 1876.</i>		
PEOPLE EX REL. MOTT v. SUPERVISORS OF GREENE CO. ....	5	650
<i>Judgment modified so as to direct an alternative mandamus to issue instead of a peremptory one : April 11, 1876. (64 N. Y., 600.)</i>		
<i>Order modified so as to direct that the costs heretofore incurred in this court and in the court below be subject to the direction of the Supreme Court upon the final hearing in that court : April 28, 1876.</i>		
PEOPLE EX REL. MUNGER v. GEROW .....	7	39
<i>Order of General Term reversed, and that of Special Term affirmed : April 18, 1876.</i>		

	HUN, VOL.	PAGE.
PEOPLE EX REL. N. Y. DISPENSARY v. GREEN.....	6	11
<i>Order of General Term reversed, judgment of Special Term affirmed, with costs : April 4, 1876. (64 N. Y., 499.)</i>		
PEOPLE EX REL. PACIFIC M. S. S. CO. v. COMRS. OF TAXES.....	1	148
<i>Judgment affirmed : September 22, 1874. (58 N. Y., 242; see 5 Hun, 200.)</i>		
PEOPLE EX REL. PACIFIC MAIL S. S. CO. v. COMRS. OF TAXES.....	5	200
<i>Affirmed : April 4, 1876. (64 N. Y., 541; see 1 Hun, 143.)</i>		
PEOPLE EX REL. SCHANCK v. GREEN.....	6	11
<i>Order of General Term reversed, judgment of Special Term affirmed, with costs : April 4, 1876. (64 N. Y., 499.)</i>		
PEOPLE EX REL. STEMMLER v. MCGUIRE.....	2	269
<i>Judgment affirmed : April 6, 1875. (60 N. Y., 640.)</i>		
PEOPLE EX REL. STEVENS v. HATT.....	7	39
<i>Order of General Term reversed, and that of Special Term affirmed : April 18, 1876.</i>		
PEOPLE EX REL. TENTH NAT. BANK v. BOARD OF APPORTIONMENT ...	3	11
<i>Affirmed : February 1, 1876. (64 N. Y., 627.)</i>		
PEOPLE EX REL. TRADESMEN'S NATIONAL BANK v. COMMISSIONERS OF TAXES.....	9	650
<i>Reversed and new trial ordered : March 20, 1877.</i>		
PEOPLE EX REL. TROWBRIDGE v. COMMISSIONERS OF TAXES.....	4	595
<i>Judgment affirmed : June 15, 1875. (62 N. Y., 630.)</i>		
PEOPLE EX REL. TWEED v. LILCOMB.....	3	760
<i>Judgment of Supreme Court and orders of Oyer and Terminer reversed and prisoner discharged : June 15, 1875. (60 N. Y., 559.)</i>		
PEOPLE EX REL. VAN TASSEL v. SUPERVISORS OF COLUMBIA COUNTY,	8	275
<i>Order of General Term reversed, and order of Special Term affirmed : November 21, 1876.</i>		
PEOPLE EX REL. WELCH v. NASH ,.....	3	585
<i>Order affirmed : September 21, 1875. (62 N. Y., 484.)</i>		
PEOPLE EX REL. WOOLF v. JACOBS.....	5	428
<i>Affirmed : April 18, 1876.</i>		
PEOPLE EX REL. YOUNG v. SUPERVISORS OF DELAWARE COUNTY..	2	102
<i>Order of General Term reversed, and order of Special Term affirmed : April 20, 1875. (60 N. Y., 381.)</i>		
PERKINS v. HATCH.....	4	187
<i>Affirmed : February 15, 1876. (64 N. Y., 624.)</i>		
PERSON v. PARDEE.....	6	477
<i>Order affirmed : April 28, 1876.</i>		

	HUN, VOL.	PAGE.
PHILIP v. GALLANT .....	1	528
<i>Judgment modified by deducting therefrom the amount of the liens, to be ascertained by court below, and, as so modified, affirmed without costs to either party in Court of Appeals: June 8, 1875. (62 N. Y., 256.)</i>		
PHILLIPS v. WHEELER .....	2	608
<i>Order affirmed: October 3, 1876.</i>		
PHOENIX WAREHOUSING CO. v. BADGER .....	6	293
<i>Affirmed: November 14, 1876.</i>		
PICKETT v. THE PEOPLE .....	8	83
<i>Affirmed: December 22, 1876.</i>		
PITMAN v. MAYOR .....	3	370
<i>Judgment affirmed: June 25, 1875. (62 N. Y., 637.)</i>		
PLACE v. CHESEBROUGH .....	4	577
<i>Order affirmed: November 30, 1875. (63 N. Y., 315.)</i>		
POOR v. BOWEN .....	1	122
<i>Judgment affirmed: February 23, 1875. (60 N. Y., 626.)</i>		
POST v. DOREMUS .....		521
<i>Judgment of General Term modified by reducing judgment to \$191.75, and interest thereon from August 11, 1873, with costs to the appellant in this proceeding, and as so modified affirmed, with costs: April 20, 1875. (60 N. Y., 371.)</i>		
POWELL v. PEOPLE .....	5	169
<i>Judgment affirmed: November 9, 1875. (63 N. Y., 88.)</i>		
POWERS v. GROSS .....	6	234
<i>Affirmed: June 13, 1876.</i>		
PRICE v. KEYES .....	1	177
<i>Judgment reversed and new trial ordered: September 21, 1875. (62 N. Y., 378.)</i>		
<i>Motion for reargument denied, with ten dollars costs: December 7, 1875.</i>		
PROUTY v. LAKE SHORE AND MICH. SOU. R. R. CO. ....	6	246
<i>Appeal dismissed: February 25, 1876. (64 N. Y., 641.)</i>		
PROVOST v. PROVOST .....	7	81
<i>Affirmed without costs to either party in Court of Appeals: June 12, 1877.</i>		
QUACKENBOSCH v. SAGER .....	2	157
<i>Order granting new trial affirmed, and judgment absolute ordered for defendants on stipulation, with costs: June 22, 1875. (62 N. Y., 344.)</i>		
RAPLEE v. ARNOT .....	4	428
<i>Affirmed: April 17, 1877.</i>		
READ v. DECKER .....	5	646
<i>Affirmed: November 14, 1876.</i>		

	HUN, VOL.	PAGE.
REAL ESTATE TRUST CO. v. KEECH.....	7	258
<i>Judgment modified by inserting a provision declaring that the defendant was not liable for any deficiency, and as so modified affirmed, without costs to either party: April, 10, 1877.</i>		
RECTOR, ETC., OF CHURCH OF REDEMPTION v. RECTOR, ETC., OF GRACE CHURCH.....	6	166
<i>Modified so as to conform to opinion, without costs in this court to either party; judgment to be settled by FOLGER, J., on notice: March 20, 1877.</i>		
REEDER v. SAYRE.....	6	56
<i>Affirmed: June 19, 1877.</i>		
REMINGTON v. PALMER.....	1	619
<i>Judgment reversed and new trial granted: April 30, 1875. (62 N. Y., 81.)</i>		
RICE v. MANLEY.....	2	492
<i>Order of General Term reversed, and judgment on report of referee: April 25, 1876.</i>		
RICHARDS v. WELLINGTON.....	5	181
<i>Reversed and new trial ordered: June 6, 1876.</i>		
RIDER v. STRYKER.....	2	115
<i>Judgment affirmed: November 9, 1875. Motion for reargument denied: December 21, 1875. (63 N. Y., 186.)</i>		
RISLEY v. INDIANAPOLIS, B. AND W. R. R. CO.....	1	202
<i>Judgment of General Term reversed and judgment on report of referee affirmed, with costs: June 8, 1875: (63 N. Y., 240.)</i>		
ROBERTSON v. HILLMAN.....	3	244
<i>Judgment affirmed: September 21, 1875. (63 N. Y., 644.)</i>		
ROBINSON v. BRISBANE.....	7	180
<i>Appeal dismissed on opinion of court below: December 12, 1876.</i>		
ROBINSON v. CHITTENDEN.....	7	133
<i>Reversed, new trial ordered: May 22, 1877.</i>		
ROEBLING v. DUNCAN.....	8	502
<i>Order affirmed: November 28, 1876.</i>		
ROLLWAGEN v. ROLLWAGEN.....	3	121
<i>Judgment affirmed: January 18, 1876. (63 N. Y., 504.)</i>		
ROOSEVELT v. ROOSEVELT.....	6	31
<i>Affirmed, costs of both parties to be paid out of the estate: March 28, 1876. (64 N. Y., 651.)</i>		
ROSENBACK v. MANUFACTURERS AND BUILDERS' BANK.....	10	148
<i>Order affirmed: April 17, 1877.</i>		
ROSS v. ROBERTS.....	2	90
<i>Judgment affirmed: January 18, 1876. (63 N. Y., 652.)</i>		



	HUN, VOL.	PAGE.
ROUNDS v. DELAWARE, L. AND W. R. R. Co. ....	3	339
<i>Affirmed: February 8, 1876. (64 N. Y., 129.)</i>		
ROWLAND v. HEGEMAN.....	1	491
<i>Judgment affirmed: December 8, 1874. (59 N. Y., 643.)</i>		
RUGGLES v. CHAPMAN.....	1	324
<i>Judgment affirmed: December 1, 1874. (59 N. Y., 163.)</i>		
RYAN v. WAVLE.....	4	304
<i>Appeal dismissed: October 8, 1875. (63 N. Y., 57.)</i>		
RUTHERFORD v. HOLMES.....	5	317
<i>Order affirmed and judgment absolute for plaintiff on stipulation, with costs: June 18, 1876.</i>		
SANFORD v. SANFORD.....	2	94
<i>Order affirmed, and judgment absolute ordered for defendant, with costs: September 21, 1875. (62 N. Y., 553.)</i>		
SAUTER v. N. Y. C. AND H. R. R. Co. ....	6	446
<i>Affirmed: April 18, 1876.</i>		
SAWYER v. PARTRIDGE ..	4	621
<i>Affirmed: June 6, 1876.</i>		
SCHANCK v. MAYOR.....	10	124
<i>Affirmed: April 27, 1877.</i>		
SCHULTZ v. CRANE.....	6	236
<i>Affirmed: April 11, 1876. (64 N. Y., 659.)</i>		
SCOFFIELD v. MCGREGOR.....	2	679
<i>Judgment affirmed: December 14, 1875. (63 N. Y., 638.)</i>		
SEADER v. RAILWAY PASS. ASSURANCE Co. ....	3	424
<i>Order affirmed, judgment absolute for defendant on stipulation, with costs: June 20, 1876.</i>		
SHAFT v. PHOENIX MUT. LIFE INS. Co.....	8	632
<i>Reversed, without costs, the cause being removed to the Circuit Court of the United States, and the court below having no jurisdiction: December 19, 1876.</i>		
SHAFT v. PHOENIX MUTUAL LIFE INSURANCE Co.....	8	632
<i>Motion granted and remittitur amended so as to give defendants costs of the appeal: January 30, 1877.</i>		
SHAW v. PEOPLE.....	3	272
<i>Judgment affirmed: October 5, 1875. (63 N. Y., 36.)</i>		
SHEPHERD v. SHEPHERD.....	1	240
<i>Order affirmed: June 19, 1874. (58 N. Y., 644.)</i>		
SHERIDAN v. THE MAYOR, ETC.....	8	424
<i>Reversed, new trial ordered: December 22, 1876.</i>		
SHERWOOD v. MERCANTILE MUT. INS. Co.....	5	115
<i>Order granting new trial affirmed, and judgment absolute for plaintiff on stipulation, with costs: May 30, 1876.</i>		

	HUN, VOL.	PAGE.
SHUFFLIN v. PEOPLE.....	4	16
<i>Judgment affirmed: June 1, 1875. (62 N. Y., 229.)</i>		
SIMSON v. SATTERLEE.....	6	305
<i>Affirmed: April 11, 1876. (64 N. Y., 657.)</i>		
SISTERS OF CHARITY OF ST. VINCENT DE PAUL v. KELLY.....	7	290
<i>Judgment reversed and decrees of surrogate affirmed: December 5, 1876.</i>		
SISTERS OF CHARITY OF ST. VINCENT DE PAUL v. KELLY.....	7	290
<i>Motion denied. When costs are given it means costs of this court to the successful party as against the unsuccessful party: February 13, 1877.</i>		
SLATTERY v. PEOPLE.....	1	811
<i>Judgment affirmed: September 22, 1874. (58 N. Y., 354.)</i>		
SLAWSON v. ALBANY RAILWAY.....	1	438
<i>Judgment affirmed: February 9, 1875. (60 N. Y., 606.)</i>		
SLINGERLAND v. BENNETT.....	4	277
<i>Reversed and new trial ordered, unless plaintiff stipulates to deduct from the recovery the sum of ninety-three dollars and thirty-six cents, and if he so stipulates, the judgment as so modified affirmed, without costs to either party in Court of Appeals: April 18, 1876.</i>		
SLOANE v. ELMER.....	1	310
<i>Reversed and judgment on verdict affirmed: February 15, 1876. (64 N. Y., 201.)</i>		
SLOCUM v. ENGLISH.....	2	78
<i>Judgment affirmed: September 21, 1875. (62 N. Y., 494.)</i>		
SLOMAN v. GREAT WESTERN R. R. Co.....	6	546
<i>Order of General Term reversed and judgment on verdict affirmed: November 14, 1876.</i>		
SMITH v. BELDEN ..	2	681
<i>Motion to dismiss appeal granted, with costs: April 6, 1875. (60 N. Y., 642.)</i>		
SMITH v. MAYOR OF NEW YORK.....	4	637
<i>Affirmed: May 30, 1876.</i>		
SMITH v. PETTEE.....	7	334
<i>Order of General Term reversed and order entered on report of referee affirmed: May 22, 1877.</i>		
SMITH v. STARR .....	4	123
<i>Appeal dismissed: June 12, 1877.</i>		
SMITH v. VAN NOSTRAND .....	3	450
<i>Reversed and new trial granted: February 25, 1876. (64 N. Y., 278.)</i>		
SORCHAN v. CITY OF BROOKLYN .....	3	562
<i>Judgment affirmed: June 22, 1875. (62 N. Y., 339.)</i>		
SPEARS v. MATTHEWS.....	6	489
<i>Order reversed: April 28, 1876.</i>		

	HUN, VOL.	PAGE.
SPINNER v. N. Y. C. AND H. R. R. R. Co. ( <i>See 2 Hun, 421.</i> ) .....	6	600
<i>Affirmed: October 6, 1876.</i>		
STANDARD OIL CO. v. TRIUMPH INS. CO. ....	8	591
<i>Affirmed: February 1, 1876. (64 N. Y., 85.)</i>		
STANTON v. KING.....	8	4
<i>Affirmed: April 3, 1877.</i>		
STARBIRD v. BARROWS.....	2	108
<i>Judgment affirmed: May 25, 1875. (63 N. Y., 615.)</i>		
STERNFEL v. CLARK .....	2	12
<i>Affirmed on opinion of court below: June 22, 1877.</i>		
STEWART v. BEALE.....	7	405
<i>Affirmed: March 20, 1877.</i>		
STOWELL v. HAZLETT.....	8	555
<i>Affirmed: June 6, 1876.</i>		
SULLIVAN v. SULLIVAN .....	4	198
<i>Reversed; new trial ordered: April 18, 1876.</i>		
SUPERVISORS OF RICHMOND CO. v. VAN CLIEF.....	1	454
<i>Judgment affirmed: April 18, 1875. (60 N. Y., 645.)</i>		
SUTTON v. N. Y. C. AND H. R. R. R. Co.....	4	760
<i>Reversed, new trial ordered: May 23, 1876.</i>		
SWIFT v. MASS. MUT. LIFE INS. CO.....	3	551
<i>Judgment reversed and new trial granted: November 16, 1875.</i> <i>(63 N. Y., 186.)</i>		
SWIFT v. PROUTY .....	6	94
<i>Affirmed: April 4, 1876. (64 N. Y., 545.)</i>		
TADDIKEN v. CANTRELL. ( <i>See 1 Hun, 710.</i> ) .....	8	523
<i>Affirmed: May 22, 1877.</i>		
TAYLOR v. HEPPER .....	2	646
<i>Judgment affirmed: September 21, 1875. (62 N. Y., 649.)</i>		
TEMPLETON v. PEOPLE.....	3	357
<i>Judgment affirmed: April 13, 1875. (60 N. Y., 648.)</i>		
TEN EYCK v. CRAIG.....	2	452
<i>Order affirmed and judgment absolute for defendants, with costs: September 21, 1875. (62 N. Y., 406.)</i>		
THOMPSON v. FARGO.....	2	379
<i>Judgment affirmed: December 21, 1875. (64 N. Y., 479.)</i>		
THURBER v. CHAMBERS .....	4	721
<i>Modified so as to make costs of all parties in the Supreme Court payable out of the reserve fund, and, as so modified, affirmed with costs to all parties in the Court of Appeals, payable out of the same fund: April 18, 1876.</i>		

	HUN, VOL.	PAGE.
<i>Judgment of this court modified so as to affirm judgment of Supreme Court, with costs of all parties in this court payable out of reserved fund and remittitur amended accordingly : June 18, 1876.</i>		
TRADESMEN'S NATIONAL BANK v. McFEELY .....	3	699
<i>Affirmed : April 28, 1876.</i>		
TRAIN v. HOLLAND PURCHASE INS. CO. ....	1	527
<i>Judgment reversed and new trial ordered : October 5, 1875. (62 N. Y., 596.)</i>		
<i>See decision of January 16, 1877.</i>		
TYNG v. U. S. SUBMARINE CO. ....	1	161
<i>Judgment affirmed : April 13, 1875. (60 N. Y., 644.)</i>		
UNION CONSOLIDATED MINING CO. v. RAHT. ....	9	308
<i>Appeal dismissed : February 20, 1877. Motion for reargument denied, with ten dollars costs : March 27, 1877.</i>		
UNION DIME SAVINGS INSTITUTION v. BISPHAM .....	3	210
<i>Order affirmed : October 3, 1876.</i>		
VAN ALLEN v. FARMERS' J. S. INS. CO. ....	4	418
<i>Judgment reversed and new trial ordered : March 28, 1876. (64 N. Y., 469.)</i>		
VAN BOKKELEN v. TAYLOR. ....	2	138
<i>Order of General Term reversed and judgment of Special Term affirmed, with costs : May 25, 1875. (62 N. Y., 105.)</i>		
VANDENBURGH v. PRES., ETC., OF GREENBUSH .....	4	795
<i>Affirmed : April 18, 1876. Motion for reargument denied, with ten dollars costs : May 30, 1876.</i>		
VANDERBILT v. ARMSTRONG .....	3	623
<i>Appeal dismissed, with costs of one appeal only : April 11, 1876. (64 N. Y., 660.)</i>		
VAN KEUREN v. CORKINS .....	4	129
<i>Affirmed : April 25, 1876.</i>		
VAN RENSSELAER v. ALBANY AND STOCKBRIDGE R. R. CO. ....	1	507
<i>Order granting new trial affirmed, and judgment absolute ordered for defendant, with costs : May 25, 1875. (62 N. Y., 65.)</i>		
VAN VALKENBURGH v. AM. POP. LIFE INS. CO. ....	9	588
<i>Affirmed, as of June 1 : June 19, 1877.</i>		
VERNOL v. VERNOL .....	2	676
<i>Judgment reversed, and new trial granted : October 5, 1875. (63 N. Y., 45.)</i>		
VOLTZ v. BLACKMAN .....	4	139
VOLTZ v. BLACKMAN .....	4	140
<i>Reversed, and new trial ordered : March 21, 1876. (64 N. Y., 440.)</i>		
VOORHIS v. MAYOR. ....	4	76
<i>Order affirmed, and judgment absolute ordered for defendant, with costs : September 21, 1875. (62 N. Y., 498.)</i>		

	HUN, VOL.	PAGE.
VOORHIS v. OLNSTEAD .....	8	744
<i>Affirmed: April 28, 1876.</i>		
VOSE v. YULEE .....	4	628
<i>Affirmed: March 21, 1876. (64 N. Y., 449.)</i>		
VROOMAN, GUARDIAN, v. TURNER ... ..	8	78
<i>Judgment against appellant for deficiency reversed, with costs: April 10, 1877.</i>		
WAIT v. RAY.....	5	649
<i>Affirmed: September 19, 1876.</i>		
WALBRIDGE v. JAMES.....	4	963
<i>Affirmed: June 13, 1876.</i>		
WALLOCK v. MAYOR .....	8	84
<i>Affirmed: September 19, 1876.</i>		
WARD v. SPENCER .....	1	622
<i>Appeal dismissed: November 17, 1874.</i>		
WARDROP v. DUNLOP.....	1	325
<i>Order affirmed, and judgment absolute ordered for defendants: November 24, 1874. (59 N. Y., 634.)</i>		
WASHINGTON CEMETERY v. PROSPECT PARK AND CONEY ISLAND R. R. CO. ....	7	655
<i>Affirmed: March 20, 1877.</i>		
WASHOE TOOL MFG. CO. v. HIBERNIA FIRE INS. CO. ....	7	74
<i>Affirmed: April 25, 1876.</i>		
WATKINS v. WILCOX .....	4	220
<i>Affirmed, September 19, 1876.</i>		
WEHLE v. CONNER (see <i>People ex rel. Wehle v. Conner</i> ).....	8	533
<i>Reversed, and new trial granted: May 22, 1877.</i>		
WEISBER v. VILLAGE OF DOUGLASS.....	4	201
<i>Affirmed: February 1, 1876. (64 N. Y., 91.)</i>		
WELLER v. TUTHILL.....	4	811
<i>Reversed and new trial ordered: June 6, 1876.</i>		
WELLS v. HOLBROOK .....	3	598
<i>Affirmed on opinion of DONOHUE, J., in court below: January 23, 1877.</i>		
WELSH v. COCHRAN .....	2	675
<i>Judgment reversed and new trial granted: November 16, 1875. (63 N. Y., 181.)</i>		
WESTERVELT v. ACKLEY .....	2	258
<i>Judgment affirmed: September 21, 1875. (63 N. Y., 505.)</i>		
WESTERN N. Y. LIFE INS. CO. v. CLINTON .....	5	118
<i>Order of General Term reversed and judgment on report of referee affirmed: June 6, 1876.</i>		

	HUN, VOL.	PAGE.
WEYMAN v. PEOPLE .....	4	511
<i>Judgment affirmed on opinion of DANIELS, J., in court below : June 1, 1875. (62 N. Y., 628.)</i>		
WHEELER v. SCHOFIELD .....	6	655
<i>Appeal dismissed : November 14, 1876.</i>		
WHITEBECK v. BUILDING MATERIAL CO. ....	2	161
<i>Judgment affirmed : April 30, 1875. (62 N. Y., 613.)</i>		
WHITE v. COULTER .....	1	357
<i>Order reversed as to Amelia Ann Coulter, and judgment and all subsequent proceedings, as to her, set aside, with costs, and order affirmed as to James E. Coulter, with costs : November 24, 1874. (59 N. Y., 629.)</i>		
WHITEHEAD v. KENNEDY .....	7	230
<i>Motion to correct remittitur denied, without costs : June 22, 1877.</i>		
WHITMORE v. MAYOR. ....	5	195
<i>Affirmed : September 19, 1876.</i>		
WHITNEY v. TOWNSEND. ....	7	233
<i>Appeal dismissed : September 19, 1876.</i>		
WILES v. SUYDAM. ....	8	604
<i>Reversed and judgment for defendant on demurrer, with leave to plaintiff to amend on payment of costs : February 8, 1876. (64 N. Y., 173.)</i>		
WILLIS v. WEAVER. ....	1	121
<i>Order granting new trial reversed, and judgment on verdict affirmed : November 10, 1874. (58 N. Y., 681.)</i>		
WILSON v. RANDALL. ....	7	15
<i>Affirmed : November 21, 1876.</i>		
WINTHROP v. MCKIM .....	6	59
<i>Judgment of General Term reversed and judgment of Special Term affirmed, with costs of all parties to be paid out of the fund : May 30, 1876.</i>		
WITBECK v. VAN RENSSELAER. ....	2	55
<i>Affirmed : January 25, 1876. (64 N. Y., 27.)</i>		
WOOD v. FISK. ....	4	525
<i>Order granting new trial reversed, and judgment ordered on nonsuit : November 23, 1875. (63 N. Y., 245.)</i>		
WOODGATE v. FLEET. ....	3	619
<i>Reversed, and new trial : April 11, 1876. (64 N. Y., 566.)</i>		
WOOD v. PEOPLE. ....	1	381
<i>Judgment reversed and new trial granted : November 24, 1874. (59 N. Y., 117.)</i>		
WOOD v. SQUIRES. ....	1	481
<i>Judgment reversed and proceedings dismissed, without costs in any court : February 26, 1875. (60 N. Y., 191.)</i>		

	HUN, VOL.	PAGE.
WOODFORD v. PEOPLE.....	3	810
<i>Judgment affirmed: May 25, 1875. (62 N. Y., 117.)</i>		
WOOSTER v. SAGE.....	6	285
<i>Affirmed: October 3, 1876.</i>		
WOSTENHOLME v. W. FILE MANUF. CO.....	4	427
<i>Affirmed: February 22, 1876. (64 N. Y., 272.)</i>		
YOUNG v. HEERMANS.....	5	121
<i>Affirmed so far as the personal property is concerned, and modified in other respects according to opinion, without costs to either party against the other in this court: June 18, 1876.</i>		
YOUNG, ADM., v. HILL.....	6	618
<i>Order of General Term reversed and that of Special Term affirmed: November 14, 1876.</i>		
ZIMMER v. N. Y. C. AND H. R. R. CO.....	7	552
<i>Affirmed: December 5, 1876.</i>		

**NOTE.** — The attention of the profession is called to the fact that the Court of Appeals, in many cases, decide an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the General Term does not necessarily show that the Court of Appeals concurred in, or dissented from the statements contained in the opinion of the Supreme Court. — [REP.]





# A T A B L E

## OF THE

### NAMES OF THE CASES REPORTED

#### IN THIS VOLUME.

<b>A.</b>		<b>PAGE.</b>		<b>PAGE.</b>
Adams, Murdock v. . . . .		566	Bergen v. Gubna . . . . .	11
Agricultural Ins. Co., Merrill			Bishop, Howk v. . . . .	509
v. . . . .	428		Blake, Carpenter v. . . . .	358
Agricultural Ins. Co., Sher-			Blazier v. Miller . . . . .	435
wood v. . . . .	593		Bookstaver, Burnet v. . . . .	481
Anderson, Merrill v. . . . .	604		Bouker, Waterbury v. . . . .	262
Ansonia Brass and Copper			Boyd v. Cronkrite . . . . .	574
Co. v. Pratt . . . . .	443		Brewers' Fire Ins. Co. v. Bur-	
Archer, Sherwood v. . . . .	73		ger . . . . .	56
Archibald, Kincaid v. . . . .	9		Brewers and Maltsters' Ins.	
Armstrong v. Wing . . . . .	520		Co. v. Davenport . . . . .	264
Auditors, People ex rel. Van			Brewster, Markey v. . . . .	16
Keuren v. . . . .	551		Buchan v. Rintoul . . . . .	183
Austin, Bennett v. . . . .	451		Buchanan v. Smith . . . . .	474
Augsbury v. Crossman . . . . .	389		Buess v. Koch . . . . .	299
<b>B.</b>			Burger, Brewers' Fire Ins.	
Baker, Van Wyck v. . . . .	39		Co. v. . . . .	56
Barbey v. Ludington . . . . .	305		Burke, Candee v. . . . .	350
Barnesciotta v. People . . . . .	137		Burnet v. Bookstaver . . . . .	481
Barnes v. Stoughton . . . . .	14		Burns v. O'Neil . . . . .	494
Barnett v. Meyer . . . . .	109		Bushnell v. Chautauque Co.	
Barr v. Shaw . . . . .	580		Nat. Bank . . . . .	378
Beardsley, Castle v. . . . .	343		<b>C.</b>	
Bechstein v. Sammis . . . . .	585		Calkins, Merrill v. . . . .	495
Bennett v. Austin . . . . .	451		Candee v. Burke . . . . .	350
— v. Garlock . . . . .	328		Candy v. Candy . . . . .	88
— Long Island R. R.			Carpenter v. Blake . . . . .	358
Co. v. . . . .	91		Carter, Youngs v. . . . .	194
			Cassidy, Stryker v. . . . .	18

	PAGE.		PAGE.
Castle v. Beardsley . . . .	343	<b>D.</b>	
Caylus v. N. Y., K. and S. R.		Davenport, Brewers and Malt-	
R. Co. . . . .	295	sters' Ins. Co. v. . . . .	264
Chadeagne, Clock v. . . . .	97	De La Vergne, Goodyear v. . . .	537
Chase v. James . . . . .	506	De Went, Verplanck v. . . . .	611
Chautauque Co. Nat. Bank,		Deyo, Murray v. . . . .	3
Bushnell v. . . . .	378	Dolz v. Morris . . . . .	201
Children's Aid Society, Noyes		Donohue v. Mayor . . . . .	37
v. . . . .	289	Doubleday, People ex rel. v.	
City of Cohoes, Parker v. . . .	531	Kelly . . . . .	283
City of Troy, Francis v. . . . .	515	Doscher, Scofield v. . . . .	582
City of Utica, Peach v. . . . .	477	Duffield v. Horton . . . . .	140
Clark v. Opdyke . . . . .	383	Durkin, Matter of . . . . .	269
Clock v. Chadeagne . . . . .	97		
Clute, Hager v. . . . .	447	<b>E.</b>	
Cohoes, City of, Parker v. . . .	531	Elmore, Scott v. . . . .	68
Collins v. Collins . . . . .	272	Elliott v. Lewis . . . . .	486
Colt v. Heard . . . . .	189	Erie Railway Co., Connecticut	
Commissioners of Taxes, Peo-		Ins. Co. v. . . . .	59
ple ex rel. Haneman v. . . .	255	Erie Railway Co., Scheu v. . . .	498
Commissioners of Taxes, Peo-			
ple ex rel. Renwick v. . . . .	207	<b>F.</b>	
Commissioners of Taxes, Peo-		Farmers' Joint-stock Ins. Co.,	
ple ex rel. St. John's Col-		Van Allen v. . . . .	397
lege v. . . . .	246	Farm Buildings Fire Ins. Co.,	
Commissioners of Taxes, Peo-		Cornish v. . . . .	466
ple ex rel. Smith v. . . . .	207	Fleischauer, Washington Life	
Conboy, Jennings v. . . . .	77	Ins. Co. v. . . . .	117
Conger, Lane v. . . . .	1	Forsyth v. Hartnett . . . . .	573
Connecticut Ins. Co. v. Erie		Fosdick, Sullivan v. . . . .	173
Railway Co. . . . .	59	Foster, Matter of . . . . .	307
Connors v. Titus . . . . .	235	Francis v. City of Troy . . . . .	515
Cook v. Horwitz . . . . .	586	Francklyn v. Sprague . . . . .	589
Cook v. N. Y. C. and H. R.		Fullerton, People ex rel. Un-	
R. R. Co. . . . .	426	derhill v. . . . .	63
Cooper, Paulding v. . . . .	20		
Cornish v. Farm Buildings		<b>G.</b>	
Fire Ins. Co. . . . .	466	Gallup v. Perue . . . . .	525
Corrigan v. Sheffield . . . . .	227	Garlock, Bennett v. . . . .	328
Craighead v. Peterson . . . . .	596	Gates v. Penn Fire Ins. Co. . . .	489
Cronkrite, Boyd v. . . . .	574	Gedney, People ex rel. Mur-	
Crossman, Augsburg v. . . . .	389	phy v. . . . .	151
Curry v. Curry . . . . .	366	Gill, Wilkinson v. . . . .	156

# TABLE OF CASES REPORTED.

xxxix

	PAGE.		PAGE.
Globe Mutual Life Ins. Co.,		Hughes, People ex rel. v.	
Koeing v. . . . .	558	Lamb . . . . .	348
Goodyear v. De La Vergne .	537	Hutchins, Willsey v. . .	502
Goodrich, Penfield v. . .	41	Hyman, Whiteside v. . .	218
Great Western Ins. Co., Hub-			
bell v. . . . .	167	J.	
Griffin v. Winne . . . .	571	Jackson, Sheridan v. . .	89
Gubna, Bergen v. . . . .	11	Jacobs v. Miller . . . .	230
Gurney, Schroeder v. . . .	413	Jacoby, Loaners' Bank v. .	143
		James, Chase v. . . . .	506
H.		Jennings v. Conboy . . .	77
Hager v. Clute . . . . .	447	——— Matter of . . . .	310
Hall v. Pettigrove . . . .	609	Jones, Haywood v. . . .	500
Haneman, People ex rel. v.		Justices, People ex rel. Willis	
Tax Comrs. . . . .	255	v. . . . .	158
Harrington v. Mayor . . .	248	Justices of Special Sessions,	
Hartmann, People v. . . .	602	People ex rel. Ziegler v. .	224
Hartnett, Forsyth v. . . .	573		
Hays v. Southgate . . . .	511	K.	
Haywood v. Jones . . . .	500	Kaufman v. Thrasher . .	438
Hazen, Wood v. . . . .	362	Kelly, People ex rel. Double-	
Head v. Teeter . . . . .	548	day v. . . . .	283
Heard, Colt v. . . . .	189	Kincaid v. Archibald . . .	9
Hebrew Asylum, Matter of .	112	Knapp v. Post . . . . .	35
Herman v. Lyons . . . . .	111	Koch, Buess v. . . . .	299
Hermance, People ex rel. v.		Koenig v. Globe Mut. Life	
Supervisors . . . . .	545	Ins. Co. . . . .	558
Hersee, Weller v. . . . .	431	Kretz, Von Sachs v. . . .	95
Hewitt v. Warren . . . .	560		
Hibbard, Sisson v. . . . .	420	L.	
Hibernia Ins. Co., Hill v. .	26	Lamb, People ex rel. Hughes	
Higgins v. Phoenix Mutual		v. . . . .	348
Life Ins. Co. . . . .	459	Lane v. Conger . . . . .	1
Hill v. Hibernia Ins. Co. .	26	Lange, Ruck v. . . . .	303
Hodges, Mulford v. . . . .	79	Lash, Sutphen v. . . . .	120
——— v. Porter . . . . .	244	Lathrop, Meyer v. . . . .	66
Hoffman, McCulloch v. . .	133	Lee, Seaman v. . . . .	607
Hooker v. Martin . . . . .	302	Lewis, Elliott v. . . . .	486
Horn v. Pullman . . . . .	471	——— v. Nat. Bank of Auburn	468
Horton, Duffield v. . . . .	140	Loaners' Bank v. Jacoby .	143
Horwitz, Cook v. . . . .	586	Loomis, Miles v. . . . .	372
Howk v. Bishop . . . . .	509	Long Island R. R. Co. v. Ben-	
Hubbell v. Great Western		nett . . . . .	91
Ins. Co. . . . .	167	Ludington, Barbey v. . .	305
		Lyons, Herman v. . . . .	111



## TABLE OF CASES REPORTED.

xli

	PAGE.		PAGE.
People ex rel. Doubleday v. Kelly . . . . .	283	Pratt, Ansonia Brass and Copper Co. v. . . . .	443
People ex rel. Haneman v. Tax Comrs. . . . .	255	Prospect Park and C. I. R. R. Co., Murdock v. . . . .	598
People ex rel. Hermance v. Supervisors . . . . .	545	Prouty v. Swift . . . . .	232
People ex rel. Hughes v. Lamb	348	Pullman, Horn v. . . . .	471
People ex rel. Murphy v. Gedney . . . . .	151	<b>R.</b>	
People ex rel. Perault v. Turner . . . . .	146	Rand, Perault v. . . . .	222
People ex rel. Renwick v. Comrs. of Taxes. . . . .	207	Renwick, People ex rel. v. Comrs. of Taxes . . . . .	207
People ex rel. Skahan v. Police Comrs. . . . .	106	Rintoul, Buchan v. . . . .	183
People ex rel. Smith v. Comrs. of Taxes . . . . .	207	Roberts, Matter of . . . . .	253
People ex rel. St. John's College v. Comrs. of Taxes . . . . .	246	Rosenback v. Manuf. and Builders' Bank . . . . .	148
People ex rel. Underhill v. Fullerton . . . . .	63	Ruck v. Lange . . . . .	303
People ex rel. Van Keuren v. Auditors . . . . .	551	Ryers, Matter of . . . . .	93
People ex rel. Willis v. Justices . . . . .	158	<b>S.</b>	
People ex rel. Zeigler v. Justices of Special Sessions . . . . .	224	Safford, Pool v. . . . .	497
Perault v. Rand . . . . .	222	Salisbury v. Stinson . . . . .	242
Perault, People ex rel. v. Turner . . . . .	146	Sammis, Bechstein v. . . . .	585
Perue, Gallup v. . . . .	525	Schanck v. Mayor . . . . .	124
Peterson, Craighead v. . . . .	596	Scheu v. Erie Railway Co. . . . .	498
Pettigrove, Hall v. . . . .	609	Schroeder v. Gurney . . . . .	413
Phelps, Wiggin v. . . . .	187	Schumacher, Phillips v. . . . .	405
Phillips v. Melville . . . . .	211	Scofield v. Doscher . . . . .	582
—— v. Schumacher . . . . .	405	Scott v. Elmore . . . . .	68
—— Underhill v. . . . .	591	Seaman v. Lee . . . . .	607
Phoenix Mut. Life Ins. Co., Higgins v. . . . .	459	Shakespeare v. Markham . . . . .	311
Police Comrs., People ex rel. Skahan v. . . . .	106	Shaw, Barr v. . . . .	580
Poole v. Safford . . . . .	497	Shear v. Van Dyke . . . . .	528
Porter, Hodges v. . . . .	244	Sheffield, Corrigan v. . . . .	227
Post, Knapp v. . . . .	35	Sheridan v. Jackson . . . . .	89
		Sherwood v. Agricultural Ins. Co. . . . .	593
		Sherwood v. Archer . . . . .	73
		Skahan, People ex rel. v. Police Comrs. . . . .	106
		Simmons, Park v. . . . .	128
		Sisson v. Hibbard . . . . .	420
		Smith, Buchanan v. . . . .	474
		——, People ex rel. v. Comrs. of Taxes . . . . .	207

	PAGE.		PAGE.
Southgate, Hays v. . . . .	511	<b>V.</b>	
Spaulding, Park v. . . . .	128	Vail v. Tuthill . . . . .	31
Spears v. Mayor . . . . .	160	Valentine, Matter of . . . . .	83
Sprague, Francklyn v. . . . .	589	Van Allen v. Farmers' Joint	
St. John's College, People ex		Stock Ins. Co. . . . .	397
rel. v. Comrs. of Taxes . . . . .	246	Van Dyke, Shear v. . . . .	528
Stinson, Salisbury v. . . . .	242	Van Keuren, People ex rel.	
Stoughton, Barnes v. . . . .	14	v. Auditors . . . . .	551
Striker, Matter of . . . . .	308	Van Slyck v. Newton . . . . .	554
Stryker v. Cassidy . . . . .	18	Van Wyck v. Baker . . . . .	39
Stuart v. Palmer . . . . .	23	Verges, Wintjen v. . . . .	576
Sullivan v. Fosdick . . . . .	173	Verplanck v. De Went . . . . .	611
Sunderlin v. Wyman . . . . .	493	Von Sachs v. Kretz . . . . .	95
Supervisors, People ex rel.		Von Wallhoffen v. New-	
Hernance v. . . . .	545	combe . . . . .	236
Sutcliffe, Underwood v. . . . .	453		
Sutphen v. Lash . . . . .	120	<b>W.</b>	
Suydam, Wiles v. . . . .	578	Warren, Hewitt v. . . . .	560
Swift, Prouty v. . . . .	232	Washington Life Ins. Co. v.	
		Fleischauer . . . . .	117
<b>T.</b>		Waterbury v. Bouker . . . . .	262
Tax Comrs., People ex rel.		Watertown Steam Engine Co.,	
Haneman v. . . . .	255	Marshall v. . . . .	463
Taylor v. Mut. Benefit Life		Weller v. Hersee . . . . .	431
Ins. Co. . . . .	52	Whiteside v. Hyman . . . . .	218
Teeter, Head v. . . . .	548	Wiggin v. Phelps . . . . .	187
Thrasher, Kaufman v. . . . .	438	Wiles v. Suydam . . . . .	578
Tierney v. N. Y. C. and H. R.		Willis, People ex rel. v. Jus-	
R. R. Co. . . . .	569	tices . . . . .	158
Tilton v. Ormsby . . . . .	7	Willsey v. Hutchins . . . . .	502
Titus, Connors v. . . . .	235	Windsor Hotel Co., Martin v.	304
Troy, City of, Francis v. . . . .	515	Wing, Armstrong v. . . . .	520
Turner, People ex rel. Perault		Winne, Griffin v. . . . .	571
v. . . . .	146	Wintjen v. Verges . . . . .	576
Tuthill, Vail v. . . . .	31	Wilkinson v. Gill . . . . .	156
		Wood v. Hazen . . . . .	362
<b>U.</b>		Wyman, Sunderlin v. . . . .	493
Underhill v. Phillips . . . . .	591		
—, People ex rel. v.		<b>Y.</b>	
Fullerton . . . . .	63	Youngs v. Carter . . . . .	194
Underwood v. Sutcliffe . . . . .	453		
Utica, City of, Peach v. . . . .	477	<b>Z.</b>	
		Zeigler, People ex rel. v.	
		Justices . . . . .	224

# TABLE OF CASES CITED.

† Approved.    ‡ Disapproved.    § Distinguished.    ¶ Followed.    \* Criticised.

## A.

			PAGE.
Adams v. Fort Plain Bank	.	36 N. Y. 261	526
Adsit v. Brady	.	4 Hill, 630	23
Aikin v. Wasson	.	24 N. Y. 482	19
Ainsley v. Mead	.	3 Lans. 116	75
Albro v. Figuera	.	60 N. Y. 630	539
Aldrich v. Reynolds	.	1 Barb. Ch. 43	74
All Saints Church v. Lovett	.	1 Hall, 218	145
Allen v. Brown	.	44 N. Y. 228	513
—— v. Mercantile and Mut. Ins. Co.	.	44 N. Y. 437	172
—— v. Staring	.	26 How. 57	442
Allis v. Wheeler	.	56 N. Y. 50	181
Almy v. State of California	.	24 How. (U. S.) 169	258
Ames v. N. Y. Union Ins. Co.	.	14 N. Y. 253	399, 400
Ammidon v. Wolcott	.	15 Abb. Pr. 314	441
Anderson v. Austin	.	34 Barb. 319	2
—— v. Manufacturers' Bank	.	14 Abb. 436	386
Andrews v. Andrews	.	8 Conn. 85	368
Angell v. Cook	.	2 T. & C. 175	510
Appleton v. Bowles	.	2 N. Y. S. C. (T. & C.) 569	394
Atkins v. Sanger	.	1 Pick. 192	473
Atwood v. Small	.	6 C. & F. 404	220
Augustine v. McFarland	.	13 N. B. Reg. 7	446

## B.

Bakeman v. Rose	.	14 Wend. 110	360
Baker v. Spencer	.	47 N. Y. 563	221
Bain v. Mattison	.	54 N. Y. 663	387
Baird v. Walker	.	12 Barb. 298	178
Bank v. Risley	.	19 N. Y. 875	71, 72
—— v. ——	.	19 N. Y. 869	40
—— v. Antwerp	.	5 Abb. Pr. 411	470
—— v. White	.	2 Seld. 236	40
Bank of Chemung v. City of Elmira	.	53 N. Y. 53	546
Bank of Kinderhook v. Gifford	.	40 Barb. 659	110
Barker v. Matthews	.	1 Denio, 335	444
Barlow v. St. Nicholas Bank	.	63 N. Y. 399, 406	209
Barnes v. Hathaway	.	66 Barb. 452	193
—— v. Perine	.	12 N. Y. 18	400
—— v. Quigley	.	59 N. Y. 205	219

	PAGE.
Beach v. Saunders . . . . .	9 Johns. 229 . . . . . 438
Beals v. Guernsey . . . . .	8 Johns. 446 . . . . . 428
Beddoe v. Wadsworth . . . . .	21 Wend. 120 . . . . . 417
Beekman v. Gibbs . . . . .	8 Paige Ch. 511 . . . . . 16
Belden v. Meeker . . . . .	47 N. Y. 810 . . . . . 180
Bellinger v. Shafer . . . . .	2 Sandf. Ch. (m. p.) 293) . . . . . 340
Benton v. Martin . . . . .	52 N. Y. 570 . . . . . 136
—— v. Pratt . . . . .	2 Wend. 385 . . . . . 221
§ Bielschofsky v. People . . . . .	3 Hun, 40 . . . . . 159
Bigler v. Mayor . . . . .	6 Hun, 239 . . . . . 253
Binsse v. Wood . . . . .	37 N. Y. 526 . . . . . 445
Birkbeck v. Stafford . . . . .	14 Abb. Pr. 285 . . . . . 586
Bissell v. Pearce . . . . .	28 N. Y. 252 . . . . . 494
Blum v. Ellis . . . . .	13 N. B. Reg. 345 . . . . . 447
Board of Supervisors v. Ellis . . . . .	59 N. Y. 620 . . . . . 88
—— Water Commissioners v. Lansing	45 N. Y. 19 . . . . . 586
Boreel v. Mayor . . . . .	2 Sandf. 552 . . . . . 210
Bostwick v. Baltimore and Ohio R. R. Co.	45 N. Y. 712 . . . . . 58
Bouton v. Neilson . . . . .	3 Johns. 474 . . . . . 438
Bowen v. Bowen . . . . .	2 Bradf. 386 . . . . . 323
Brague v. Lord . . . . .	15 Alb. Law Jour. 66 . . . . . 550
Bridge v. Hubbard . . . . .	15 Mass. 96 . . . . . 76
Briggs v. Davis . . . . .	20 N. Y. 16; 21 N. Y. 574 . . . . . 418
Brown v. Nichols . . . . .	42 N. Y. 26 . . . . . 279
—— v. Penfield . . . . .	36 N. Y. 473 . . . . . 518, 414
—— v. State of Maryland . . . . .	12 Wheat. 419 . . . . . 257
Browning v. Hanford . . . . .	5 Denio, 586 . . . . . 586
Bruce v. Pearson . . . . .	3 Johns. 534 . . . . . 229
■ Buffalo City Bank v. North West. Ins. Co.	30 N. Y. 251 . . . . . 170, 171
Bullock v. Babcock . . . . .	3 Wend. 891 . . . . . 563
Bumstead v. Dividend Mut. Ins. Co. . . . .	12 N. Y. 81 . . . . . 400
Burrows v. Whitaker . . . . .	3 Hun, 260 . . . . . 543
Burtis v. Dodge . . . . .	1 Barb. Ch. 91 . . . . . 291
Bush v. Tilley . . . . .	49 Barb. 600 . . . . . 213
Butts v. Genung . . . . .	5 Paige, 254 . . . . . 524

## C.

Campbell v. Bruen . . . . .	1 Bradf. 224 . . . . . 186
—— v. Stakes . . . . .	2 Wend. 187 . . . . . 563
Candee v. Burke . . . . .	4 N. Y. S. C. (T. & C.) 143 . . . . . 356
Carpenter v. Blake . . . . .	50 N. Y. 696 . . . . . 359
—— v. ——— . . . . .	60 Barb. 488 . . . . . 361
—— v. Wright . . . . .	4 Bosw. 655 . . . . . 263
Carroll v. Charter Oak Ins. Co. . . . .	38 Barb. 402 . . . . . 399
Carver v. Jackson dem. Astor . . . . .	4 Peters, 1-90 . . . . . 387, 340
Cary v. White . . . . .	59 N. Y. 386 . . . . . 550
Case v. Phelps . . . . .	39 N. Y. 164 . . . . . 199
Castle v. Duryea . . . . .	32 Barb. 480 . . . . . 445
Chamberlain v. Perkins . . . . .	51 N. H. 386 . . . . . 395
Chautauque Co. Bank v. White . . . . .	2 Seld. 236 . . . . . 418
Chipman v. Sabbator . . . . .	7 Paige, 47 . . . . . 71



# TABLE OF CASES CITED.

xliv

	PAGE.
Ohism v. Keith . . . . .	1 Hun, 589 . . . . . 339
Christopher v. Austin . . . . .	1 Kern. 217 . . . . . 185
Church v. Brown . . . . .	21 N. Y. 315 . . . . . 345
City Bank of New Haven v. Perkins . . . . .	29 N. Y. 554 . . . . . 513, 514
Clapp v. Fullerton . . . . .	34 N. Y. 190 . . . . . 473
Clark v. Ford . . . . .	1 Abb. Ct. App. Dec. 359 . . . . . 101
Clarke v. Tunncliffe . . . . .	38 N. Y. 58 . . . . . 567
Clements v. Collins . . . . .	2 T. R. 502 . . . . . 154
Clinton v. Eddy . . . . .	54 Barb. 54 . . . . . 104
Coates v. Coates . . . . .	1 Duer, 664 . . . . . 263
Collins v. Bennett . . . . .	46 N. Y. 490 . . . . . 476
—— v. Burns . . . . .	63 N. Y. 1 . . . . . 400
Comrs. of Kinderhook v. Claw . . . . .	15 Johns. 537 . . . . . 437
Comstock v. Johnson . . . . .	46 N. Y. 615 . . . . . 497
Conklin v. Thompson . . . . .	29 Barb. 218 . . . . . 563
Con. Society v. Perry . . . . .	6 N. H. 164 . . . . . 145
Connecticut Bank v. Smith . . . . .	17 How. 487 . . . . . 145
Conrad v. Trustees of Ithaca . . . . .	16 N. Y. 158 . . . . . 479
Conway v. Bush . . . . .	4 Barb. 564 . . . . . 543, 544
Cook v. Grant . . . . .	1 Paige, 407 . . . . . 584
—— v. Whipple . . . . .	55 N. Y. 150 . . . . . 269, 280
—— v. ——— . . . . .	55 N. Y. 157 . . . . . 445
Coombs v. New Bed. Cord. Co. . . . .	102 Mass. 592 . . . . . 537
Corn Exchange Ins. Co. v. Babcock . . . . .	42 N. Y. 613 . . . . . 75
Corning v. Corning . . . . .	6 N. Y. 104 . . . . . 360
Coventry v. Barton . . . . .	17 Johns. 142 . . . . . 553
Cowen v. Village of West Troy . . . . .	43 Barb. 48 . . . . . 532
Cox v. Clift . . . . .	2 Comst. 118 . . . . . 419
Craft v. Merrill . . . . .	14 N. Y. 456 . . . . . 417
Cranson v. Cranston . . . . .	4 Mich. 230 . . . . . 199
Creed v. Hartmann . . . . .	29 N. Y. 591 . . . . . 586
Crockett v. Smith . . . . .	14 Abb. 62 . . . . . 128
Crofut v. Brooklyn Ferry Co. . . . .	36 Barb. 201 . . . . . 206
Cromwell v. Selden . . . . .	3 N. Y. 253 . . . . . 497
Cropsey v. Sweeney . . . . .	27 Barb. 310 . . . . . 382
Cummings v. Morris . . . . .	25 N. Y. 625 . . . . . 513
Cuthbert v. Haley . . . . .	8 T. R. 890 . . . . . 74

## D.

Dainese v. Allen . . . . .	45 How. 480 . . . . . 532
Dakin v. Demming . . . . .	6 Paige, 95 . . . . . 105
Dana v. Fiedler . . . . .	12 N. Y. 40 . . . . . 527
Davenport v. Ruckman . . . . .	37 N. Y. 568, 573 . . . . . 480, 536
Davy v. Hallett . . . . .	3 Caines, 18 . . . . . 172
Day v. Bardwell . . . . .	97 Mass. 246 . . . . . 394
Decker v. Mathews . . . . .	2 Kern. 313 . . . . . 221
De Figaniere v. Young . . . . .	2 Robt. 670 . . . . . 233
Delafield v. State of Illinois . . . . .	2 Hill, 159 . . . . . 445
De Llamosas v. Llamosas . . . . .	62 N. Y. 618 . . . . . 277
Demarest v. Darg . . . . .	32 N. Y. 281 . . . . . 255
Dennistoun v. Draper . . . . .	5 Blatchf. 388 . . . . . 386

		PAGE.
Devin v. Patchin . . . . .	26 N. Y. 441, 449 . . . . .	291, 292
Devlin v. Mayor . . . . .	63 N. Y. 8 . . . . .	410
Devol v. Barnes . . . . .	7 Hun, 342 . . . . .	513
Dickerson v. Spaulding . . . . .	7 Hun, 288 . . . . .	267
Dickerson v. Tillinghast . . . . .	4 Paige, 215 . . . . .	417
Dinkelspiel v. Franklin . . . . .	7 Hun, 339 . . . . .	216
Dodd v. Curry . . . . .	4 How. 123 . . . . .	122
Doe v. Newton . . . . .	5 A. & E. 514 . . . . .	376
Doe dem. Willis v. Martin . . . . .	4 Term R., 39-63 . . . . .	337
Doherty v. Inhabitants of Waltham . . . . .	4 Gray, 596 . . . . .	534, 536
Draper v. Snow . . . . .	20 N. Y. 331 . . . . .	11, 434
Dresser v. Dresser . . . . .	35 Barb. 573 . . . . .	323
Dubois v. Baker . . . . .	30 N. Y. 355 . . . . .	376, 377
Dudley v. Mayhew . . . . .	3 Comst. 9, 15, 18 . . . . .	281
Duncan v. Lawrence . . . . .	6 Abb. 304 . . . . .	514
Dunham v. Dey . . . . .	15 Johns. 555 . . . . .	417
Dunkin v. Lawrence . . . . .	1 Barb. 441 . . . . .	263
Dunn v. Von Hornton . . . . .	5 Hals. 270 . . . . .	145
Dutcheas v. Davis . . . . .	14 Johns. 245 . . . . .	145
Dwight v. Enos . . . . .	5 Seld. 470 . . . . .	213
Dyckman v. The Mayor . . . . .	5 N. Y. 441 . . . . .	92

## E.

Easton v. Smith . . . . .	1 E. D. Smith, 318 . . . . .	526
Eaton v. Alger . . . . .	47 N. Y. 345; 57 Barb. 179; 513, 514 . . . . .	
Eckford v. De Kay . . . . .	8 Paige, 89-94; 26 Wend. 29 . . . . .	340
Eckstein v. Frank . . . . .	1 Daly, 334 . . . . .	563
Edgerton v. Page . . . . .	20 N. Y. 283 . . . . .	155
Edmonston v. McLoud . . . . .	16 N. Y. 543 . . . . .	453
Ellis v. People . . . . .	21 How. Pr. 356 . . . . .	375
— v. Warnes . . . . .	Cro. Jac. 33 . . . . .	74
— v. Willard . . . . .	9 N. Y. 539 . . . . .	570
Elmendorf v. Harris . . . . .	23 Wend. 628 . . . . .	437
Elwood v. Deifendorf . . . . .	5 Barb. 408 . . . . .	38
Ely v. Holton . . . . .	15 N. Y. 595 . . . . .	437
Embury v. Sheldon's Exrs. . . . .	N. Y. Week. Dig., Mch 12, 1877, 339 . . . . .	
Eno v. Woodworth . . . . .	4 Comst. 249 . . . . .	382
Enos v. Eigenbrodt . . . . .	32 N. Y. 444 . . . . .	532
Erben v. Lorillard . . . . .	19 N. Y. 299 . . . . .	322
Ericsson v. Brown . . . . .	33 Barb. 390 . . . . .	19
Erwin v. Downs . . . . .	15 N. Y. 575 . . . . .	43
Etna Insurance Co. v. Tyler . . . . .	16 Wend. 397 . . . . .	61
Evertson v. Evertson . . . . .	5 Paige, 644 . . . . .	417

## F.

Farnham v. Campbell . . . . .	34 N. Y. 430 . . . . .	419
Farrington v. Bullard . . . . .	40 Barb. 512, 516 . . . . .	231
Fay v. Grimstead . . . . .	10 Barb. 321 . . . . .	470, 500
Fields v. Fowler . . . . .	2 Hun, 400 . . . . .	435
Filer v. N. Y. Central R. R. Co. . . . .	49 N. Y. 42 . . . . .	205

# TABLE OF CASES CITED.

xlvii

		PAGE.
First National Bank <i>v.</i> Garlinghouse	53 Barb. 615	75
Fishkill <i>v.</i> Fishkill and Beekman R. R. Co.	22 Barb. 634	554
Fisk <i>v.</i> Chicago, R. I. and P. R. R. Co.	3 Abb. (N. S.), 453	386
— <i>v.</i> Newton	1 Den. 45	499
— <i>v.</i> Union Pacific R. R. Co.	10 Abb. (N. S.), 457	386
Fitzhugh <i>v.</i> Wiman	5 Seld. 559	449
Fleeman <i>v.</i> McKean	25 Barb. 474	543, 544
Flood <i>v.</i> Reynolds	18 How. 112	514
Flynn <i>v.</i> Equitable Life Ins. Society	7 Hun, 387	55
Ford <i>v.</i> Cobb	20 N. Y. 344	422
— <i>v.</i> Ford	53 Barb. 525	213
Fountain <i>v.</i> Pettet	38 N. Y. 184	104
Fowler <i>v.</i> Poling	2 Barb. 300; 6 Barb. 166	417
Frecking <i>v.</i> Rolland	53 N. Y. 422	505
Frees <i>v.</i> Ford	2 Seld. 176	495
Freeson <i>v.</i> Bissell	63 N. Y. 168	301
Fuller <i>v.</i> Van Geesen	4 Hill, 171	6, 82
Fullerton <i>v.</i> McCurdy	55 N. Y. 637	355
Fulton Fire Ins. Co. <i>v.</i> Baldwin	37 N. Y. 648	22

## G.

Gale <i>v.</i> Gale	19 Barb. 249	197
Galen <i>v.</i> Clyde and Rose R. R. Co.	27 Barb. 543, 551	554
Gallarati <i>v.</i> Orser	4 Bosw. 94; 27 N. Y. 324	449
Galpin <i>v.</i> Page	18 Wall. (U. S.) 350	241
Garr <i>v.</i> Mairat	1 Hilt., 498	526
Garrison <i>v.</i> Mayor	21 Wal. 196	164
Gasper <i>v.</i> Adams	24 Barb. 287	110
Gellatly <i>v.</i> Lowery	6 Bosw. 113	465
Geraud <i>v.</i> Stagg	10 How. 369	510
Gere <i>v.</i> Clark	6 Hill, 350	524
Gerhard <i>v.</i> Bates	2 E. & B. 498	231
German Bank <i>v.</i> Edwards	53 N. Y. 544	591
Gibbons <i>v.</i> Ogden	9 Wheat. 2	261
Gleason <i>v.</i> Clark	9 Cow. 57	240
Glenny <i>v.</i> Hitchins	4 How. Pr. 98	382
Glover <i>v.</i> Whittenhall	2 Den. 633	586
Godefroy <i>v.</i> Dalton	6 Bing. 468	240
Godfrey <i>v.</i> Moser	3 Hun, 218	526
Goit <i>v.</i> National Protection Ins. Co.	25 Barb. 189	399
§ Goodale <i>v.</i> Walsh	2 N. Y. S. C. (T. & C.) 311	508
Gorham <i>v.</i> Village of Cooperstown	59 N. Y. 660	533
Gould <i>v.</i> Horner	12 Barb. 601	470, 500
Gould <i>v.</i> Vomack	2 Ala. 83	368
Governors of the Alms-house <i>v.</i> American Art Union	7 N. Y. 228	153
Gracie <i>v.</i> New York Ins. Co.	8 Johns. 246	61
Graham <i>v.</i> Graham	34 Penn. St. 475	322
Grant <i>v.</i> Brooklyn	41 Barb. 381	536
— <i>v.</i> Howard Ins. Co.	5 Hill, 10	468

	PAGE.
Graves v. Waite . . . . .	59 N. Y. 156 . . . . . 219
Green v. Greenbank . . . . .	{ 2 Marshall, 485; 4 Eng. C. L. R. 875 . . . . . 546
Griffin v. Mayor . . . . .	9 N. Y. 456-461 . . . . . 535, 536
Griswold v. Fowler . . . . .	24 Barb. 185 . . . . . 2

## H.

Hadley v. Ayres . . . . .	12 Abb. (N. S.) 240 . . . . . 526
Haines v. Smith . . . . .	45 N. Y. 776 . . . . . 108
Halden v. Crafts . . . . .	4 E. D. Smith, 490 . . . . . 178
Hale v. Omaha Nat. Bank . . . . .	49 N. Y. 626, 631, 632 . . . . . 301
Hall v. Wilson . . . . .	16 Barb. 548 . . . . . 501
Hancke v. Hooper . . . . .	7 Carr. & Payne, 84 . . . . . 240
Hanover Ins. Co. v. Tomlinson . . . . .	58 N. Y. 215 . . . . . 277
Harmony v. Bingham . . . . .	2 Kern. 99 . . . . . 595
Harrington v. Snyder . . . . .	3 Barb. 380 . . . . . 476
Harris v. Huntback . . . . .	1 Burr. 373 . . . . . 43
—— v. People . . . . .	59 N. Y. 599 . . . . . 410
Hartant v. Bank of Erie . . . . .	2 Mo. 169 . . . . . 145
Havens v. Nat. City Bank of Brooklyn . . . . .	13 N. B. Reg. 95 . . . . . 446
Hawks v. Weaver . . . . .	46 Barb. 164 . . . . . 74
Hayden v. Demets . . . . .	58 N. Y. 426, 431 . . . . . 543, 545
Hays v. Jackson . . . . .	6 Mass. 149 . . . . . 181
Heath v. Austin . . . . .	12 Blatch. 320 . . . . . 386
Henderson v. Cairns . . . . .	14 Barb. 15 . . . . . 586
Henriquez v. Dutch W. T. Co. . . . .	2 Ld. Raym. 1535 . . . . . 145
Herring v. Sanger . . . . .	3 Johns. Cases, 72 . . . . . 88
Hetzell v. Barber . . . . .	Ct. App., March 20, 1877, MS. 418
Hidden v. Waldo . . . . .	55 N. Y. 294 . . . . . 591
Higgins v. Murray . . . . .	4 Hun, 565 . . . . . 543
Hill v. Beebe . . . . .	13 N. Y. 562 . . . . . 67
—— v. Burke . . . . .	62 N. Y. 106 . . . . . 527
Hines v. City of Lockport . . . . .	41 How. Pr. 435 . . . . . 479
Hobart v. Frost . . . . .	5 Duer, 672 . . . . . 456
Holderstaffe v. Saunders . . . . .	6 Mod. 16 . . . . . 223
Holdsworth v. Wise . . . . .	7 B. & C. 794; 14 E. C. L. 855 . . . . . 171
Holtsinger v. Nat. Corn Exchange Bank . . . . .	6 Abb. Pr. (N. S.) 292 . . . . . 598
Holmes v. Davis . . . . .	19 N. Y. 486-493 . . . . . 357
—— v. Holmes . . . . .	3 Paige, 368 . . . . . 199
—— v. Rankin . . . . .	17 Barb. 454 . . . . . 526, 527
—— v. Williams . . . . .	10 Paige, 329 . . . . . 74
Home Ins. Co. v. Baltimore Warehouse Co. . . . .	16 Am. Law Reg. 162, 168 . . . . . 404
Hope v. Acker . . . . .	7 Abb. 308 . . . . . 263
—— v. Balen . . . . .	58 N. Y. 980 . . . . . 154
Hopping v. Quin . . . . .	12 Wend. 517 . . . . . 239
Hover v. Barkhoof . . . . .	44 N. Y. 113 . . . . . 554
Howe v. Buffalo and Erie Railroad . . . . .	37 N. Y. 297 . . . . . 552
Howell v. Mills . . . . .	56 N. Y. 226 . . . . . 339
—— v. Ripley . . . . .	10 Paige, 43 . . . . . 119
—— v. State . . . . .	3 Gill. 14 . . . . . 257, 261
Hubbell v. Schreyer . . . . .	15 Abb. (N. S.) 300 . . . . . 507

## TABLE OF CASES CITED.

xlix

		PAGE.
Hughes v. Bank of Somerset	5 Litt. 47	145
Hull v. Ruggles	56 N. Y. 424	158
Hyde v. Lathrop	8 Keyes, 597	545
— v. Stone	7 Wend. 354	428

## I.

Isham v. Davidson	52 N. Y. 287	96
Indermaur v. Dames	4 Rep. (2 C. P.) 311	537
Inman v. Western Fire Ins. Co.	12 Wend. 452	595
Insurance Company v. Ritchie	5 Wall. 541	282
— v. Wilkinson	13 Wall. 222	492
Ireland v. City of Rochester	51 Barb. 430	437

## J.

Jacks v. Nichols	5 N. Y. 178	76
Jackson v. Chamberlain	3 Wend. 620	418
— v. Edwards	7 Paige, 404	40
— v. Henry	10 Johns. 185	74
— v. Peck	4 Wend. 302	199
— v. Schoonmaker	4 Johns. 402	340
— v. Vail	7 Wend. 125	473
— v. Wendell	5 Wend. 142	489
— v. Wilkinson	17 Johns. 146	489
Jacobowsky v. People	6 Hun, 524	130, 140
Jacobson v. Le Grange	3 Johns. 199	322
Jenny v. Jenny	24 Verm. 324	200
John v. Farmers' Bank	2 Blackf. 367	145
Johnson v. Friel	50 N. Y. 679	536
Jones v. Barlow	62 N. Y. 202	579
— v. Case	38 How. 349	122
— v. Martin	3 Anst.	326
Jordan v. Hyatt	3 Barb. 282	437
Judd v. Ives	4 Metc. 401	394

## K.

Kamp v. Kamp	59 N. Y. 212	36
Kein v. Tupper	52 N. Y. 550, 553	229, 545
Kemp v. Burt	4 B. & A. 424	241
Kent v. Kent	1 Hun, 529	323
Killmore v. Culver	24 Barb. 656	514
Kimball v. Huntington	10 Wend. 675	592
Kimball v. Newell	7 Hill, 116	43
Kinsey v. Bailey	9 Hun, 452	424
Knapp v. Warner	57 N. Y. 668	154
Knight v. Mann	118 Mass., 146; 120 id., 220	544
Kowing v. Manly	49 N. Y. 192	377

## L.

Lamerson v. Marvin	8 Barb. 9	2
L'Amoreux v. Visscher	2 Comst. 278	216
Lamphier v. Phipos	8 C. & P. 475	240

## TABLE OF CASES CITED.

	PAGE.
Lane v. Schermerhorn . . . . .	1 Hill, 97 . . . . . 483
Lappin v. Charter Oak Ins. Co. . . . .	58 Barb. 825 . . . . . 595
Lawrence v. Bayard . . . . .	7 Paige, 70 . . . . . 339
Lawrence v. French . . . . .	25 Wend. 448; 7 Hill, 519 . . . . . 155
Larned v. Hudson . . . . .	57 N. Y. 151 . . . . . 357
Leaird v. Smith . . . . .	44 N. Y. 619 . . . . . 801
Lee v. Lee . . . . .	39 Barb. 172 . . . . . 391
Leighton v. Sargent . . . . .	7 Foster (N. H.), 460 . . . . . 359
Leonard v. Allen . . . . .	11 Cush. 241 . . . . . 380
Levin v. Russell . . . . .	42 N. Y. 251 . . . . . 104
Lisk v. Sherman . . . . .	25 Barb. 433 . . . . . 323, 323, 324
Livingston v. Hammer . . . . .	7 Bosw. 671 . . . . . 450
Livingston v. Meldrum . . . . .	19 N. Y. 440 . . . . . 16
Livingston v. The Mayor . . . . .	8 Wend. 85 . . . . . 98
Loaners' Bank v. Tigney . . . . .	MS. opin. of Brady, J. . . . . 145
Lorillard v. Town of Monroe . . . . .	11 N. Y. 392 . . . . . 554
Lott v. Mobile Trade Co. . . . .	48 Ala. 578 . . . . . 257
Low v. Austin . . . . .	13 Wall. 29 . . . . . 258

## M.

Mack v. Patchin . . . . .	42 N. Y. 171 . . . . . 154
Mackey v. Mackey . . . . .	43 Barb. 58 . . . . . 334
Malcom v. Loveridge . . . . .	18 Barb. 372 . . . . . 556
Mallory v. Traveller's Ins. Co. . . . .	47 N. Y. 52 . . . . . 445
Manhattan Co. v. Thompson . . . . .	58 N. Y. 82 . . . . . 75
Manning v. Tyler . . . . .	21 N. Y. 567 . . . . . 470
Marsh v. Falker . . . . .	40 N. Y. 562 . . . . . 297
Martin v. Berry . . . . .	37 Cal. 208 . . . . . 395
—— v. Kunzmuller . . . . .	37 N. Y. 396 . . . . . 6
—— v. Wright's Admrs. . . . .	18 Wend. 460 . . . . . 322, 326
Marvin v. Smith . . . . .	56 Barb. 600 . . . . . 193, 418
Matter of Brinkman . . . . .	7 N. B. Reg. 421 . . . . . 446
—— Broadway . . . . .	61 Barb. 488; 49 N. Y. 150 . . . . . 164
—— Estate of Shaw . . . . .	1 Tucker, 352 . . . . . 817
—— Greenfield . . . . .	2 N. B. Reg. 311 . . . . . 364
—— Housberger . . . . .	2 Bank. Reg. R. 92 (1st ed. p. 83) 267
—— Hudson City Savings Bank . . . . .	5 Hun, 612 . . . . . 546
—— Levy . . . . .	4 Hun, 501 . . . . . 271
—— Martin . . . . .	2 N. B. Reg. 548 . . . . . 364
—— New York Protectory . . . . .	8 Hun, 91 . . . . . 546
—— N. Y. C. and H. R. R. Co. . . . .	5 Hun, 86 . . . . . 452
—— Peugnet . . . . .	5 Hun, 434 . . . . . 271, 307
—— Second Ave. Methodist Church . . . . .	Court of App. MS. . . . . 114
—— Sloan . . . . .	12 N. B. Reg. 59 . . . . . 364
Mather v. Crawford . . . . .	36 Barb. 564 . . . . . 554
Matthews v. Coe . . . . .	49 N. Y. 57 . . . . . 217
—— v. Duryee . . . . .	3 Abb. Ct. App. 220 . . . . . 198
Mayor v. Colgate . . . . .	12 N. Y. 140 . . . . . 309
—— v. Erben . . . . .	24 How. 358 . . . . . 532
—— v. Mabie . . . . .	13 N. Y. 151 . . . . . 154
—— v. Furze . . . . .	3 Hill, 612 . . . . . 536

# TABLE OF CASES CITED.

li

	PAGE.
Mays v. Fritton . . . . .	11 N. B. Reg. 229; 20 Wall. 414 446
McCartee v. Campbell . . . . .	1 Barb. Ch. 465 . . . . . 101, 108
—— v. Teller . . . . .	2 Paige, 511 . . . . . 389
McCluskey v. Cromwell . . . . .	11 N. Y. 598 . . . . . 449
McCollum v. Seward . . . . .	62 N. Y. 316 . . . . . 526
McCulloch v. State of Maryland . . . . .	4 Wheat. 316 . . . . . 260
McDonald v. Mayor . . . . .	4 N. Y. S. C. (T. & C.) 178 . . . . . 253
McEntee v. New Jersey Steamboat Co. . . . .	45 N. Y. 84 . . . . . 499
McEvers v. Lawrence . . . . .	1 Hoff. Ch. 173 . . . . . 595
McGinity v. Mayor . . . . .	5 Duer, 674 . . . . . 534, 536
McMahon v. Erie R. R. Co. . . . .	20 N. Y. 468 . . . . . 526, 527
McQueen v. Babcock . . . . .	3 Keyes, 428 . . . . . 110
McSpedon v. Troy City Bank . . . . .	3 Abb. Ct. App. Dec. 183 . . . . . 86
Mechanics' Bank of Williamsburgh v. Foster . . . . .	44 Barb. 87 . . . . . 500
Merrick v. Brainard . . . . .	88 Barb. 589; 34 N. Y. 208 . . . . . 62
Mersereau v. Ryers . . . . .	8 N. Y. 261 . . . . . 524
Metropolitan Bank v. Lord . . . . .	1 Abb. 185 . . . . . 518
Meyer v. Amidon . . . . .	45 Barb. 169, 171 . . . . . 297
Miller v. Bowles . . . . .	58 N. Y. 253 . . . . . 143, 267
—— v. Burroughs . . . . .	4 Johns. Ch. 436 . . . . . 181
—— v. Folger . . . . .	14 Ohio, 610 . . . . . 868
—— v. Manice . . . . .	6 Hill, 114 . . . . . 221
—— v. O'Brien . . . . .	9 Bank. Reg. R. 26 . . . . . 267
Mills v. Van Voorhies . . . . .	20 N. Y. 412 . . . . . 198
Mitchel v. Reynolds . . . . .	1. P. Wms. 181 . . . . . 433
Moak v. Coats . . . . .	33 Barb. 498 . . . . . 12
Moens v. Heyworth . . . . .	10 M. & W. 147 . . . . . 220
Monilaws v. Andrews . . . . .	8 Hun, 65 . . . . . 75
Montague v. Dudman . . . . .	2 Vesey, Sr. 396 . . . . . 223
More v. Smedburgh . . . . .	8 Paige, 601 . . . . . 301
Morey v. Town of Newfane . . . . .	8 Barb. 645 . . . . . 554
Moore v. Eastman . . . . .	1 Hun, 578 . . . . . 563
—— v. Littel . . . . .	41 N. Y. 66 . . . . . 339
—— v. Lyons . . . . .	25 Wend. 119 . . . . . 339
—— v. Westervelt . . . . .	3 Sandf. 762 . . . . . 526
Morrill v. Aden . . . . .	19 Vt. 505 . . . . . 564
Mullins v. People . . . . .	24 N. Y. 399 . . . . . 108
Munch v. Cockerell . . . . .	8 Sim. 219 . . . . . 388
Munger v. Hess . . . . .	23 Barb. 75 . . . . . 564
Munsell v. Lewis . . . . .	2 Den. 224 . . . . . 306
Murray v. Vanderveer . . . . .	6 Hun, 302 . . . . . 528
Mygatt v. Wilcox . . . . .	45 N. Y. 806 . . . . . 527

## N.

Nat. Bank of Metropolis v. Orcutt . . . . .	48 Barb. 256 . . . . . 470
Neals' Executors v. Gilmore . . . . .	79 Penn. 431 . . . . . 324
Neff v. Clute . . . . .	13 Barb. 466 . . . . . 221
New York Dry Dock Co. v. American Ins. Co. . . . .	11 Paige, 384 . . . . . 223
N. Y. and Harlem R. R. Co. v. Mayor . . . . .	1 Hilton, 562, 588 . . . . . 126

		PAGE.
N. Y. L. and T. Co. v. Manning . . .	8 Sandf. Ch. (m. p.) 58	181
New York Piano Company v. New Haven Steamboat Company . . .	2 Abb. (N. S.) 357	386
Nicoll v. Walworth . . .	4 Denio, 385	389, 340
Nichols v. Kingdom Ore Co. . .	56 N. Y. 618	6
North River Bank v. Aymar . . .	3 Hill, 262	598

## O.

Oakley v. Morton . . .	1 Kern. 25	395
— v. Stanley . . .	5 Wend. 528	497
Oberlander v. Spiess . . .	45 Barb. 175	297
Ogden v. Saunders . . .	12 Wheat. 273	394
Ogilvie v. Ogilvie . . .	1 Bradf. 358	323
Olcott v. Maclean . . .	10 Hun, 277	269
Olyphant v. Baker . . .	5 Denio, 379	543, 545
O'Neil v. Buffalo Mut. Ins. Co. . .	3 Comst. 123	400
O'Neill v. James . . .	48 N. Y. 84	400
Osgood v. Chicago, D. and V. R. R. Co. . .	14 Am. Law Reg. (N. S.) 506	385
— v. The Manhattan Co. . .	3 Cow. 612	473
Overing v. Foote . . .	43 N. Y. 298	419
Owners of Ground v. The Mayor . . .	15 Wend. 374	25, 437
Owens v. Holland Purchase Ins. Co. . .	56 N. Y. 565	55

## P.

Pacific Mail Co. v. Leuling . . .	7 Abb. (N. S.) 87, 41	123, 263
Packer v. Wilson . . .	15 Wend. 343	345
Park v. Musgrave . . .	6 Hun, 223	263
Parker v. Arctic Fire Ins. Co. . .	1 N. Y. S. C. (T. & C.) 397	399
— v. Sanborn . . .	7 Gray, 191	96
Parris v. Cobb . . .	5 Richardson's Eq. 450	181
Partridge v. Mitchell . . .	3 Edw. Ch. 180	105
Patterson v. Patterson . . .	13 Johns. 379	322
Payne v. Gardiner . . .	29 N. Y. 146	179, 182
— v. Hodge . . .	7 Hun, 612	530
Peck v. Hiller . . .	24 Barb. 178	155
§ Pell's Case . . .	MS. Commission of App.	546, 547
Pendleton v. Dyett . . .	4 Cow. 581	155
Pennington v. Lowenstein . . .	1 Bank. Reg. R. 570 (1st ed. 157)	267
People v. Banks . . .	4 N. Y. Week. Dig. 124	410
— v. Beardsley . . .	52 Barb. 105	210
— v. Cassity . . .	2 Lans. 294; 46 N. Y. 46	210
— v. Copperman . . .	56 N. Y. 593	159
— v. Hewit . . .	2 Parker, 20	375
— v. Hynds . . .	30 N. Y. 470	409
— v. Kendall . . .	25 Wend. 399	564
— v. Kingsley . . .	8 Hun, 233	578
— v. Lake . . .	2 Kernan, 353	206
— v. Mayor . . .	4 N. Y. 419	25
— v. Moring . . .	3 Abb. Ct. of App. 539	258
— v. N. Y. Central R. R. Co. . .	29 N. Y. 418	277
— v. Quigg . . .	59 N. Y. 83	92



## TABLE OF CASES CITED.

liii

		PAGE.
People v. Ravenswood Co.	20 Barb. 518	145
— v. Smith	9 Hun, 446	603
— v. Spooner	1 Denio, 843	375
People ex rel. The Academy of the Sacred Heart v. The Commissioners	6 Hun, 109	246
People ex rel. Cook v. Board of Police	39 N. Y. 506	108
— v. Cox v. Special Sessions	7 Hun, 214	436
— v. Lodowick v. Akin	4 Hill, 606	255
People ex rel. Pac. M. S. Co. v. Comrs. of Taxes	48 Barb. 157; 68 N. Y. 243	257
People ex rel. Pitts (Pells) v. Suprs. of Ulster	68 Barb. 83	547
People ex rel. Tweed v. Liscomb	60 N. Y. 559	310
* People ex rel. Williams v. Hurlbut	5 How. 446; 1 Code (N. S.) 75	440
Perry v. Chester	53 N. Y. 243	234
Perry v. Langley	7 Am. Law Reg. 429	394
Perry v. Lorillard Ins. Co.	61 N. Y. 214	594
Parsell v. Stryker	41 N. Y. 480	323, 325, 326
Person v. Warren	14 Barb. 488	485
Pervear v. Commonwealth	5 Wall. 475	261
Petrie v. Shoemaker	24 Wend. 85	483
Pettit v. Shepard	32 N. Y. 97	154
Petty v. Petty	4 B. Monroe, 215	199
Phoenix Fire Ins. Co. v. Philip	13 Wend. 81	375
Pickett v. Barron	29 Barb. 505	417
Pitney v. Glen's Falls Ins. Co.	61 Barb. 335	399
Pitt v. Yalden	4 Burr. 2060	240
Plumb v. Cattaraugus Co. Mut. Ins. Co.	18 N. Y. 392	55
Pomeroy v. Hulin	7 How. Pr. 161	112, 122
Porter v. Clark	12 How. 107; 5 Seld. 142	458
Porter v. Williams	5 Seld. 142	71
Post v. Aetna Ins. Co.	43 Barb. 351	400
Post v. Dorr	4 Edw. Ch. (m. p.), 412	120
Potter v. Cromwell	40 N. Y. 237	424
Powell v. Clark	5 Abb. 70	231
Powell v. Newburgh	19 Johns. 284	553
Powell v. Waters	8 Cow. 691	74
Power v. Shiel	1 Mallory, 296	368
Powers v. Witty	42 How. Pr. 352	255
Prescott v. Norris	32 N. H. 101	564
Prevot v. Lawrence	51 N. Y. 221	505
Price v. Oswego and Syracuse R. R. Co.	50 N. Y. 213	499

## Q.

Quakenbush v. Ehle	5 Barb. 469	322
--------------------	-------------	-----

## R.

Randall v. Willis	5 Vesey, 262	326
Randolph v. Loughlin	48 N. Y. 456	377
Rathbun v. Sawyer	15 Wend. 451	223
Reading R. R. Co. v. Pennsylvania	15 Wall. 284	257

		PAGE.
Real Estate Trust Co. v. Seagreave	49 How. 489	216
Reed v. Reed	52 N. Y. 651	291
Reed v. Rens. Glass Factory	3 Cow. 893	526
Reid v. Lord	4 Johns. 118	139
Reid v. Vanderheyden	5 Cow. 719	291
Reynolds v. Commerce Ins. Co.	47 N. Y. 605	30
Rex v. Clark	1 D. & R. 43	139
Rex v. Martin	6 C. & P. 563	360
Richards v. Salter	6 Johns. Ch. 444	577
Robbins v. Mount	38 How. 24	563
Roberts v. Carter	38 N. Y. 107	284
Robinson v. Chamberlain	34 N. Y. 389	22
§ Robinson v. McManus	4 Lans. 380	349
Robinson v. Raynor	28 N. Y. 494	17, 322, 323, 324, 326
Roderigas v. E. R. Savings Institution	{ Am. Law Reg., April, 1876; 63 N. Y. 460	180, 182
Roe v. Swezey	10 Barb. 247	524
Ross v. Sadgben	21 Wend. 166	433
Rouse v. Whited	25 N. Y. 170	539
Rowley v. Empire Ins. Co.	{ 4 Ct. App. Dec. 131; 36 N. Y. 550	29, 55, 492
—— v. Gibbs	14 Johns. 385	428
Russell v. Duffon	4 Lans. 399, 406, 407	582
Russel v. Gray	11 Barb. 541	586
Ryan v. Valandingham	7 Ind. 416	145

## S.

Safford v. McDonough	120 Mass. 290	544
Sanford v. Sanford	45 N. Y. 723	514
Savage v. Howard Ins. Co.	52 N. Y. 504	594
—— v. Murphy	34 N. Y. 508	199
Scott v. Johnson	5 Bosw. 213, 224	500
Second Nat. Bank v. Miller	63 N. Y. 639; 2 T. & C. 104	504
Secor v. Sturgis	16 N. Y. 558	81
Selden v. Vermilya	3 N. Y. 525	340
Seybel v. Nat. Currency Bank	54 N. Y. 298	38
Shannon v. Brower	2 Abb. 377	123
Shears v. Solhinger	10 Abb. (N. E.) 287	395
Shelden v. Edwards	35 N. Y. 279	424
Sheldon v. Parker	3 Hun, 498	514
Sheridan v. House	4 Keyes, 569	339
—— v. Mayor	4 Weekly Dig. 28	513, 514
Sherman v. Willett	42 N. Y. 150	2
Shilcock v. Passman	7 Carr. & Payne, 289	240
Shultz v. Pulver	3 Paige, 182; 11 Wend. 363	291
Sills v. Brown	9 Carr. & P. 601	206
Simar v. Canaday	53 N. Y. 298	198
Skinner v. Stuart	39 Barb. 206	444
Slack v. Heath	4 E. D. Smith, 95; 1 Abb. 81	450
Smalley v. Doughty	6 Bosw. 66	470
Smedes v. Elmendorf	3 Johns. 185	241

# TABLE OF CASES CITED.

lv

	PAGE.
Smith v. Bell . . . . .	6 Peters, 68 . . . . . 191
— v. Butler . . . . .	38 How. Pr. 192 . . . . . 386
— v. Dunning . . . . .	61 N. Y. 249 . . . . . 505
— v. Empire Ins. Co. . . . .	25 Barb. 497 . . . . . 480
— v. Lynes . . . . .	5 N. Y. 41 . . . . . 543, 544
— v. McAllister . . . . .	14 Barb. 434 . . . . . 489
— v. Remington . . . . .	42 Barb. 75 . . . . . 101, 103
— v. Sergeant . . . . .	2 Hun, 107 . . . . . 473
— v. Smith . . . . .	2 Halst. (N. J. Ch. R.) 515 . . . . . 199
— v. Velie . . . . .	60 N. Y. 106 . . . . . 526
Soloman v. Neidig . . . . .	1 Daly, 200 . . . . . 229
§ Spencer v. Barnett . . . . .	35 N. Y. 94 . . . . . 508
Speyers v. Lambert . . . . .	1 Sweeney, 335; 37 How. 815 . . . . . 346
Staats v. Howlett . . . . .	4 Denio, 580 . . . . . 345
Stanton v. Miller . . . . .	58 N. Y. 192 . . . . . 324
State v. Bangor . . . . .	30 Me. 341, 344 . . . . . 535, 536
— v. Ross . . . . .	4 Zabriskie, 501 . . . . . 248
Stevens v. Barringer . . . . .	18 Wend. 639 . . . . . 306
Stevenson v. Maxwell . . . . .	2 Comst. 409 . . . . . 301
Stone v. Flower . . . . .	47 N. Y. 566 . . . . . 400
Storrs v. Utica . . . . .	17 N. Y. 104 . . . . . 536
Story v. N. Y. and H. R. R. Co. . . . .	6 N. Y. 86 n. . . . . 510
Stow v. Hamlin . . . . .	11 How. 452 . . . . . 526
Stowell v. Chamberlain . . . . .	60 N. Y. 272 . . . . . 355
Stuart v. Kissam . . . . .	11 Barb. 271 . . . . . 524
Studwell v. Shapter . . . . .	54 N. Y. 249 . . . . . 563
Sturges v. Crowninshield . . . . .	4 Wheat. 122 . . . . . 394
Swaine v. Perine . . . . .	5 Johns. Ch. 482 . . . . . 199
Sweet v. Chapman . . . . .	7 Hun, 576 . . . . . 501
— v. Irish . . . . .	26 Barb. 467 . . . . . 178
— v. Tuttle . . . . .	14 N. Y. 465 . . . . . 6

## T.

Taggart v. Murray . . . . .	53 N. Y. 233 . . . . . 198
Tallman v. American Express Co. . . . .	6 Hun, 377 . . . . . 529
Tamisier v. Cassard . . . . .	17 Abb. 187 . . . . . 514
Taylor v. Carryl . . . . .	20 How. (U. S.) 533 . . . . . 394
— v. Monnot . . . . .	4 Duer, 116 . . . . . 306
Terry v. Wheeler . . . . .	25 N. Y. 520, 525 . . . . . 543
— v. Wiggins . . . . .	47 N. Y. 512 . . . . . 192
Thayer v. Thayer . . . . .	14 Vt. 107 . . . . . 199
The Assessor v. Osbornes . . . . .	9 Wall. 567 . . . . . 232
— Clement . . . . .	2 Curtis (U. S.) 363 . . . . . 206
Thurber v. Harlem Bridge, etc., R. R. Co. . . . .	60 N. Y. 326 . . . . . 479
Tift v. Horton . . . . .	53 N. Y. 877 . . . . . 423, 424
Tillsbaugh v. Dick . . . . .	8 How. 33 . . . . . 122
Tompkins v. Dudley . . . . .	25 N. Y. 272 . . . . . 595
Traders' Bank v. Campbell . . . . .	14 Wall. 87 . . . . . 393
† Trench v. Chenango Mut. Ins. Co . . . . .	7 Hill, 122 . . . . . 480
Tucker v. Tucker . . . . .	{ 4 Keyes, 136; 4 Abb. Ct. App. Dec. 426 . . . . . 317

		PAGE.
Tuthill v. Davis . . . . .	20 Johns. 285 . . . . .	76
Tyler v. Willis . . . . .	38 Barb. 827 . . . . .	456, 457

## U.

Union Bank of Sandusky v. Torrey . . . . .	5 Duer, 626 . . . . .	464
—— Nat. Bank of Troy v. Baasett . . . . .	3 Abb. Pr. (N. S.) 359 . . . . .	110
U. S. Bank v. Stearns . . . . .	15 Wend. 816 . . . . .	145

## V.

Van Allen v. Farm. Joint Stock Ins. Co. . . . .	6 T. & C. 593 . . . . .	399
Van Beuren v. Van Gaasbeck . . . . .	4 Cow. 496 . . . . .	181, 526
Vandevoort v. Gould . . . . .	36 N. Y. 639 . . . . .	857
Van Doren v. Mayor . . . . .	9 Paige, 388 . . . . .	419
§ Van Rensselaer v. Jewett . . . . .	2 N. Y. 135 . . . . .	526
Van Slyck v. Snell . . . . .	6 Lans. 299 . . . . .	510
Van Vleck v. Burroughs . . . . .	6 Barb. 341 . . . . .	101, 104
Van Wyck v. McIntosh . . . . .	14 N. Y. 489 . . . . .	876
Van Wyck v. Wright . . . . .	18 Wend. 157 . . . . .	489
§ Van Zandt v. Mut. Benefit Life Ins. Co. . . . .	55 N. Y. 169 . . . . .	559
Varnum v. Martin . . . . .	15 Pick. (Mass.) 440 . . . . .	241
Vernam v. Smith . . . . .	15 N. Y. 327 . . . . .	154
Viburt v. Frost . . . . .	3 Abb. 119 . . . . .	457
Vickery v. Dickson . . . . .	35 Barb. 96 . . . . .	76
Viele v. Troy and Boston R. R. Co. . . . .	20 N. Y. 184 . . . . .	301
Voorhees v. McGinnis . . . . .	48 N. Y. 278 . . . . .	423

## W.

Wakeman v. Dalley . . . . .	44 Barb. 498 . . . . .	297
Wakely v. Davidson . . . . .	26 N. Y. 887 . . . . .	497
Walker v. Bank of Washington . . . . .	3 How. (U. S.) 62 . . . . .	76
—— v. Johnson . . . . .	8 How. Pr. 240 . . . . .	112
—— v. Symonds . . . . .	3 Swanst. 75 . . . . .	388
Wallace v. Morss . . . . .	5 Hill, 391 . . . . .	563
Wallerstein v. Columbia Ins. Co. . . . .	44 N. Y. 208 . . . . .	172
Walls v. Bailly . . . . .	49 N. Y. 464 . . . . .	29
Walsh v. Washington Ins. Co. . . . .	32 N. Y. 427, 443 . . . . .	203
Wambaugh v. Gates . . . . .	11 Paige, 505 . . . . .	524
Ward v. Dewey . . . . .	16 N. Y. 522 . . . . .	419
Waring v. The Mayor . . . . .	8 Wall. 110 . . . . .	261
Watson v. Bailey . . . . .	2 Duer, 509 . . . . .	500
Waydell v. Luer . . . . .	5 Hill, 448 . . . . .	67
Weber v. Kingsland . . . . .	8 Bosw. 415 . . . . .	465
Weed v. N. Y. and H. R. R. Co. . . . .	29 N. Y. 616 . . . . .	582
Weeks v. Southwick . . . . .	12 How. 170 . . . . .	263
Welland Canal Co. v. Hathaway . . . . .	8 Wend. 480 . . . . .	145
Wendell v. Jackson . . . . .	8 Wend. 183 . . . . .	488
Wenman v. Mohawk Ins. Co. . . . .	13 Wend. 267 . . . . .	11
West v. Moore . . . . .	14 Vt. 447 . . . . .	564
—— v. Village of Brockport . . . . .	16 N. Y. 161 . . . . .	479

# TABLE OF CASES CITED.

lvii

	PAGE.
Western v. Romaine . . . . .	1 Bradf. 87 . . . . . 291
Westervelt, Exr. etc. v. Gregg . . . . .	1 Barb. Ch. 469 . . . . . 186
†Weyman v. People . . . . .	4 Hun, 511 . . . . . 159, 160
Whitbeck v. Rowe . . . . .	25 How. 403 . . . . . 2
Whitcomb v. Hungerford . . . . .	42 Barb. 178 . . . . . 213
White v. Coatsworth . . . . .	6 N. Y. 137 . . . . . 255
Whitney Arms Co. v. Barlow . . . . .	63 N. Y. 62 . . . . . 382
Whitwell v. Putnam Ins. Co. . . . .	6 Lans. 166 . . . . . 399
Wilcox v. Howell . . . . .	44 N. Y. 398 . . . . . 216
—— v. Smith . . . . .	26 Barb. 316 . . . . . 291
Williams v. Gibbs . . . . .	5 Ad. & El. 208 . . . . . 241
—— v. Hutchinson . . . . .	3 N. Y. 812 . . . . . 323
Williamson v. Brown . . . . .	15 N. Y. 354 . . . . . 416
Willink v. Vanderveer . . . . .	1 Barb. 599 . . . . . 221
Wilson v. City Bank . . . . .	17 Wall. 473 . . . . . 267
—— v. Herkimer Co. Ins. Co. . . . .	2 Seld. 53 . . . . . 430
—— v. Wilson . . . . .	1 Barb. Ch. 592 . . . . . 71
Winchell v. Hicks . . . . .	18 N. Y. 558 . . . . . 400
Wood v. Chapin . . . . .	3 Kern. 509 . . . . . 417
—— v. Fisk . . . . .	63 N. Y. 245 . . . . . 449
—— v. Hunt . . . . .	38 Barb. 302 . . . . . 200
Woodburn v. Chamberlin . . . . .	17 Barb. 446 . . . . . 556
Wooster v. Chamberlain . . . . .	29 Barb. 602 . . . . . 557
Worcester Med. Inst. v. Harding . . . . .	11 Cush. 285 . . . . . 145
Wynehamer v. People . . . . .	8 Kern. 378 . . . . . 436

## Y.

Yonkers and New York Fire Ins. Co. v. Bishop . . . . .	1 Daly, 449 . . . . . 255
--	---------------------------

## UNITED STATES CONSTITUTION CITED.

	PAGE.
U. S. Const., art. 1, § 8, sub. 8 } . . . . .	255
U. S. Const., art. 1, § 9, sub. 5 } . . . . .	255
U. S. Const., art. 1, § 10, sub. 2 } . . . . .	255
U. S. Const., art. 3, § 2, sub. 1 . . . . .	280

## NEW YORK STATE CONSTITUTION CITED.

N. Y. Const., art. 1, § 6 . . . . . 436	N. Y. Const., art. 3, § 23 . . . . . 410
N. Y. Const., art. 3, § 16 . . . . . 409	Const. of 1846, art. 6, § 8 . . . . . 197
N. Y. Const., art. 3, § 18 . . . . . 410	

## UNITED STATES REVISED STATUTES CITED.

U. S. R. S., § 18 . . . . . 281	U. S. R. S., §§ 5105, 5106 . . . . . 363
U. S. R. S., § 639 . . . . . 334	U. S. R. S., § 5106 . . . . . 96
U. S. R. S., § 646, tit. 13, chap. 7 . . . . . 578	U. S. R. S., § 5108 . . . . . 365
U. S. R. S., § 4972, etc. . . . . 269-281	U. S. R. S., § 5128 . . . . . 280
U. S. R. S., § 5044 . . . . . 266	U. S. R. S., § 5597 . . . . . 281
U. S. R. S., § 5073 . . . . . 95	U. S. R. S., § 5601 . . . . . 281

## ACTS OF CONGRESS CITED.

1833, chap. 57 . . . . . 386	1874, chap. 390, § 11, sub. 1 . . . . . 280
1867, chap. 176, § 57 . . . . . 446	1875, chap. 137 . . . . . 384
1874, chap. 390, § 2, . . . . . 269, 280, 281	1876, chap. 284 . . . . . 365
1874, chap. 390, § 7 . . . . . 363	

# NEW YORK STATE STATUTES CITED.

				PAGE.
1 R. S., 67, § 32	.	157	2 R. S., 36, § 11	396
1 R. S., 513, §§ 55, 56	.	411	2 R. S., 53, 54	85
1 R. S., 517, § 80	.	411	2 R. S., 92, § 52	184, 185, 186
1 R. S., 518, §§ 83, 84	.	411	2 R. S., 92, §§ 52, 54	185
1 R. S., 521, § 108	.	408	2 R. S., 94, §§ 60, 64	185, 186
1 R. S., 525, § 125	.	408	2 R. S., 94, § 63	187
1 R. S., 725, § 32	.	342	2 R. S., 96, § 75	181
1 R. S., 726, § 38	.	78	2 R. S., 114, § 9	101
1 R. S., 727, § 46, ed. of 1830.	388	2 R. S., 191, §§ 152, 153, 154,	588, 584	
1 R. S., 732, article Powers	78	2 R. S., 193, § 165	15	
1 R. S., 732, § 77	79	2 R. S., 223, § 10	291	
1 R. S., 734, §§ 94, 95	78	2 R. S., 321	419	
1 R. S., 741, § 9	369	2 R. S. (m. p.), 440, § 77	350	
1 R. S., 768, § 1	592	2 R. S., 620, § 1	244	
2 R. S., 16, § 2	396			

## FIFTH EDITION.

1 R. S., 905, §§ 1, 3 . . . . .	209	3 R. S., 310 . . . . .	310
3 R. S., 184, § 1 . . . . .	485	3 R. S., 367, § 25 . . . . .	291
3 R. S., 152, § 68 . . . . .	179	1 R. S., 905 . . . . .	247
3 R. S., 157, § 23 . . . . .	180	3 R. S., 908, §§ 1, 4 . . . . .	128

## EDMONDS' EDITION.

2 R. S., 80, § 47 . . . . .	180	2 R. S., 472 . . . . .	524
2 R. S., 82, § 56 . . . . .	180		

## SESSION LAWS.

1837, chap. 37, p. 361; 1 Glf. Laws, 337 . . . . .	1862, chap. 18, § 108 . . . . .	480
1840, " 40, § 12 . . . . .	1862, " 478 . . . . .	18
1846, " 326, § 7 . . . . .	1862, " 477 . . . . .	147
1845, " 112 . . . . .	1863, " 464 . . . . .	345
1847, " 197, . . . . .	1864, " 417 . . . . .	86
1847, " 450 . . . . .	1867, " 781, § 9, . . . . .	452
1847, " 455, § 8, amd. laws, . . . . .	1869, " 217 . . . . .	23
1848, " 40, § 18 . . . . .	1869, " 720 . . . . .	21
1849, " 157 . . . . .	1869, " 888 . . . . .	50
1849, " 256 . . . . .	1869, " 890 . . . . .	161
1849, " 258 . . . . .	1870, " 78 . . . . .	427
1849, " 375, § 8 . . . . .	1870, " 80, § 253 . . . . .	147
1850, " 324, § 3, subsec. 3 . . . . .	1870, " 137, § 20 . . . . .	271, 307
1851, " 455 . . . . .	1870, " 175, § 4 . . . . .	603
1853, " 153 . . . . .	1870, " 359 . . . . .	186, 292
1853, " 238 § 2, . . . . .	1870, " 359, § 9 . . . . .	291
1857, " 63, tit. 5, § 14 . . . . .	1870, " 383, § 27 . . . . .	116
1857, " 628, § 6 . . . . .	1870, " 383 . . . . .	271

					PAGE.
1870, chap. 394	.	.	7	1873, chap. 777	. 225
1870, " 467, § 1	.	.	495	1873, " 777, § 1	. 225
1870, " 619	.	.	23	1873, " 813, tit. 2, § 3	518, 519
1871, " 303, § 20	.	.	94	1873, " 813, tit. 4	. 518
1871, " 381	.	.	284, 285	1873, " 813, § 3	. 517
1871, " 574, § 1	.	.	307	1874, " 287	. 92
1871, " 695	.	.	546	1875, " 223, § 59	. 147
1873, " 29, § 3	.	.	147	1875, " 371, § 48	. 149
1873, " 365, §§ 14, 18	.	.	126	1875, " 482, §§ 19, 20	. 12
1873, " 489, § 1	.	.	507	1875, " 482	. 409
1873, " 549, § 2	.	.	603	1876, " 274	. 285, 286

---

### SECTIONS OF THE CODE CITED.

					PAGE.
§ 74	.	.	103	§§ 261, 277	. 213
§§ 100, 101, 102, 110	.	.	103	§ 268	. 452
§ 105	.	.	96	§ 277	213, 449
§ 110	.	.	11	§ 289, sub. 4	. 449
§ 111	.	.	483, 518, 514	§ 292	. 441
§ 113	.	.	484	§ 296	. 441
§ 121	.	.	212	§ 298	. 71
§ 133	.	.	303	§ 303	. 234
§ 142	.	.	243, 582	§ 306	. 181
§ 168	.	.	96	§ 309	. 293
§ 171	.	.	213	§ 329	. 452
§ 179, sub. 3	.	.	587	§ 344	. 575
§ 211	.	.	449	§ 366	. 510
§ 223	.	.	264	§ 385	. 111
§ 232	.	.	267	§§ 393, 399	. 8
§ 235	.	.	267	§ 403	. 498
§ 237, sub. 4	.	.	267	§ 467	. 441
§ 238	.	.	267	§§ 468, 469	. 123



**Cases**  
DETERMINED IN THE  
**SECOND DEPARTMENT**  
AT  
**GENERAL TERM,**  
**February, 1877.**

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JOHN H. LANE, APPELLANT, *v.* ABRAHAM B. CONGER,  
IMPLEADED, ETC., RESPONDENT.

*Foreclosure sale — division of mortgaged premises into lots by mortgagor — when sold in parcels.*

The plaintiff conveyed to defendant a tract of land four hundred and ten feet by one hundred and nine feet ten inches, which had always been used as one residence, and took back a purchase-money mortgage thereon. Subsequently the defendant, without the assent of the plaintiff, made a map of the land, and laid out an avenue sixty feet wide through the middle thereof and two lanes upon the ends, which were opened but never dedicated to the public. Upon a sale under a foreclosure of the mortgage, the defendant insisted that the land should be sold according to the lots laid down on the map. *Held*, that the sheriff was right in refusing so to do, and in selling the land in one tract.

APPEAL from an order made at the Special Term, setting aside a sale had under a judgment of foreclosure and directing a resale.

*Wheeler & Brown*, for the appellant.

*A. B. Conger*, for the respondent.

BARNARD, P. J.:

This is an appeal from an order setting aside a sale in foreclosure and directing a resale. On the 30th day of April, 1862, the defend-

ant, Abraham B. Conger, bought of the plaintiff the premises in question, and executed the mortgage foreclosed as part of the purchase-money. The purchase-price was \$4,700, and this mortgage was for \$3,700, all of which is due, and over \$1,000 of interest unpaid thereon. The defendant Conger has made a paper street through the middle of said premises, which he has named Hudson avenue, and has opened it, but has not dedicated it as a public street. Of course it has not been and cannot be accepted by the public authorities until dedicated. This avenue is sixty feet wide. He has also laid out on paper two lanes of twenty feet in width at each end of the piece. Neither of these lanes are entirely taken from the mortgaged land, but are in part made up of other lands, I presume of Mr. Conger. The piece, in its entirety, is only 400 feet by 109.10.

The avenue so called is the avenue on which the lots are to be fronted. The effect of this is to separate the house from the barn, one being on one side of the avenue and the other on the opposite side. The map makes fourteen distinct lots. Two are less than ten feet front; two are triangles, one of sixteen feet front, and running ninety-seven feet to a point, and one of five feet ten inches front by seventy feet to a point. The place had been used as one residence before plaintiff bought, and while he owned it, and has been so used subsequently by defendant Conger. The mapping was done by defendant Conger alone, and without the assent or concurrence of plaintiff. The premises were sold as one parcel. The order directs a resale according to the map. I think the sale was right. It does not distinctly appear whether the judgment directed the sale in one parcel. It is stated in the points to have been in the usual form, directing the sale of the mortgaged premises or so much thereof as was sufficient to pay the debt and costs. The decree is not given, but I assume the decree to have been in the usual form. The sale was of the premises as described in the mortgage and decree. The rights of way sold are only those directed by the decree, and are copied from the mortgage. The sheriff was not bound to sell in parcels under the circumstances. (*Lamerson v. Marvin*, 8 Barb., 9; *Griswold v. Fowler*, 24 id., 135; *Sherman v. Willett*, 42 N. Y., 150; *Whitbeck v. Rowe*, 25 How., 403; *Anderson v. Austin*, 34 Barb., 319.)

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SECOND DEPARTMENT, FEBRUARY TERM, 1877.

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How can a resale be made according to the map? Are the avenue and lanes to be sold? The mortgage does not cover the entire lanes, and why is sixty feet in width of the mortgaged lands to be withdrawn from the security of the mortgage if they are to be withdrawn? If the avenue and lanes are not to be sold, what right have the purchasers of the lots upon them to either avenue or lane? If not sold, then they will belong to Conger, or at best any right the purchasers would get in them would rest in estoppel merely. If avenue and lanes are to be sold, why sell them as streets? A purchaser may close them. I think the order should be reversed, and the sale, as made, be completed by the sheriff.

Order reversed, with ten dollars costs and disbursements.

GILBERT, J., concurred; DYKMAN, J., not sitting.

Order reversed, with ten dollars costs and disbursements.

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AMBROSE S. MURRAY AND OTHERS, AS TRUSTEES, ETC.,  
RESPONDENTS, v. ABRAHAM D. DEYO, APPELLANT.

*Railroad mortgage—trustees taking possession of road under—right of debtor of road to offset claim against the company, falling due after change of possession—Judgment of foreclosure—against whom it may be read in evidence—Witness—what question calls for opinion of.*

The Wallkill Valley Railway Company having made default in the payment of the interest falling due on mortgage bonds issued by it, the plaintiffs, the trustees under the mortgage, in pursuance of the terms thereof, entered into possession of the road in May, 1873, and received the rents and tolls thereof for the benefit of the bondholders. Subsequently, the mortgage was foreclosed and the road sold to the plaintiffs. This action was brought to recover money due to the road for transporting the mails for the half year, ending December 31, 1873, received by the defendant, who had acted as agent for the road in collecting such money from the treasury department, and which he refused to pay over, he claiming to be entitled to set-off against this amount a note given by the company to him in October, 1872, due one year after date. *Held*, that as the plaintiffs' right to receive the earnings of the road became absolute in May, 1873, at which time defendant's note had not yet become due, no offset thereof could be made in this action.

Upon the trial, plaintiffs were allowed, against the defendant's objection and exception, to introduce in evidence the judgment, in the action of foreclosure, to which the defendant was not a party. *Held*, that this was proper; that the

mortgage and decree were properly submitted to show the transfer of the title to the plaintiffs.

Upon the trial a witness, who had been employed by one of the plaintiffs, was asked in their behalf: "For whom and in whose behalf did Mr. Burdell make that employment, if you understood?" *Held*, that the question did not necessarily call for an opinion of the witness, and was properly admitted.

APPEAL from a judgment in favor of the plaintiffs, entered upon the trial of this action by the court, without a jury.

This action was brought by the plaintiffs as trustees of the second mortgage made by the Wallkill Valley Railway Company, dated January 1, 1872. The plaintiffs, as such trustees, claim to recover certain moneys collected by the defendant from the United States government for postal service on the Wallkill Valley Railway, under a contract between that company and the government. The moneys collected were for postal service between July 1, 1873, and January 1, 1874.

The mortgage provided that in case of default, "it shall and may be lawful, and the said parties of the second part hereby are expressly and fully authorized and empowered to enter upon in that case and take possession of all and singular the said railway and the property and premises hereby mortgaged, and through the agency of the persons they may from time to time appoint to collect and receive the tolls, incomes and profits of said road, hereby conveyed for the purpose of the security aforesaid, and until the same shall be sold or disposed of by them as aforesaid."

In May, 1873, the plaintiffs took possession of the road under the provision of the mortgage above mentioned.

On the trial one of plaintiffs' witnesses testified that he was employed in June, 1873, by the plaintiffs as superintendent on this road. He was then asked, "For whom and on whose behalf did Mr. Berdell (one of the plaintiffs) make that employment, if you understood?" This question was objected to by the defendant as calling for the conclusion of the witness. The witness was allowed to answer, and said: "For the trustees of the second mortgage bonds."

*A. Schoonmaker*, for the appellant.

*Bacon & Dwyer*, for the respondents.

BAERNARD, P. J. :

The Wallkill Valley Railway Company executed to the plaintiffs, as trustees, a mortgage to secure the holders of certain bonds of the company. The mortgage was given in January, 1872. It covered the railway and its appurtenances, including the franchise, all the personal property, and all tolls, rents, issues and profits to be derived therefrom. The plaintiffs, as trustees, were on default in payment of the interest on the bonds for a specified time, and upon a request in writing by a majority of the bondholders, authorized and empowered by the terms of the mortgage to take immediate possession of the road and to receive all the tolls and rents for the security of the bondholders. The railway company defaulted in the payment of its interest in July, 1872, in part, and entirely on the 1st January, 1873, and subsequent. The plaintiffs, by the written request of a majority of the stockholders, took possession of the railway and its property, under the mortgage, and subsequently sold the same by virtue of a decree of this court. When the plaintiffs took possession of the road, the defendant was the agent of the Wallkill Valley railway to collect from the post-office department of the United States the moneys earned by the railroad for carrying the mails thereon. The moneys received by him for the half year ending June 30, 1873, he paid to the plaintiffs; the money he collected the next half year, he collected and did not pay over. The amount of the collection was \$418.44. The railway company gave defendant a note for value on October 1, 1872, due in one year, for \$455.25. The defendant claims to offset this note in this action.

Upon the trial, the mortgage to plaintiffs and the judgment roll of the judgment determining the issue and ordering the sale of the railway between plaintiffs and the Wallkill Valley railway were received in evidence. Deyo was not a party to it, and the first question presented is whether they were properly admitted. They were admitted to prove title to the moneys in dispute. If the Wallkill Valley railway had given a conveyance to plaintiffs of the right to the moneys, no objection could be made to the proof of the conveyance, even though Deyo was not a party to it. This case is the same. The plaintiffs had a mortgage which could, by default of payment of interest, be made an absolute and perpetual assignment of

the road and its earnings. The judgment determined the existence of the facts necessary to support it conclusively. Deyo was not a party, but the judgment is a muniment of title against the defendant or any other stranger. The defendant was an agent of the company. He had no title to be overreached by the decree. If he had, his title would not be affected. The mortgage and decree passed all interest from the Wallkill Valley Railway Company as effectually as if by deed, and was properly received in evidence. (*Fuller v. Van Geesen*, 4 Hill, 171.)

The defendant had no right of offset.

The plaintiffs' right became absolute in May, 1873, to the earnings of the road; defendant's note did not become due until October following. When the change of title was before the maturity of the note, no offset could be made. (*Martin v. Kunzmüller*, 37 N. Y., 396.) The plaintiffs put, upon the trial, this question to the witness Jones: "For whom and on whose behalf did Mr. Burdell make that employment, if you understood?" This was admitted, under defendant's exception, and this ruling is urged for error. I think the question here proposed rather comes under the case of *Sweet v. Tuttle* (14 N. Y., 465). There the question was: "On the part and behalf and for whom were the services rendered?" This was held not necessarily to call for an opinion. The question in this case does not. A single question further would have rendered it certain whether he related what was said, or only a deduction from what was said. In *Nichols v. Kingdom Iron Ore Co.* (56 N. Y., 618), the question is entirely different: "For whom did you set up the machinery, as you supposed?" This question manifestly called for an opinion of the witness instead of for a fact.

This question becomes unimportant if I am right in the propriety of the introduction of the judgment roll. The evidence taken under the question we are considering was only addressed to the fact of the plaintiffs' taking possession, in May, 1873, of the road. The roll establishes that fact and fixes its date to be the 20th May, 1873.

Judgment affirmed, with costs.

GILBERT, J., concurred; DYKMAN, J., not sitting.

Judgment affirmed, with costs.

CATHARINE TILTON, APPELLANT, v. CLARENCE ORMSBY, EXECUTOR, ETC., OF JOSEPH TILTON, DECEASED, AND WILLIAM V. TILTON, RESPONDENTS.

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*Examination as to effects of deceased persons — Chap. 394, of 1870 — Inadmissibility of testimony objectionable under § 399 of Code — Order for delivery of property to executor — Evidence justifying — Form of order.*

Under chapter 394, of 1870, authorizing an executor or administrator to institute an inquiry as to any effects of the deceased, believed to be withheld or concealed from him, the surrogate acts judicially in conducting the examination, and the testimony receivable therein is subject to the restrictions of section 399 of the Code, prohibiting the admission of evidence given by parties interested in the proceeding as to personal transactions had with the deceased.

In order to justify an order requiring the delivery of the property to the executor or administrator, the surrogate must find, as a fact, that it belongs to the estate; it is not enough that he should determine that there is probable cause to believe that it belongs to it.

The order should specify distinctly the property, delivery of which is required, and an order, which, after specifying certain articles, proceeds, "and all other property, goods, etc., of the said (deceased), in her possession or under her control at her place of residence," is too broad and must be reversed.

APPEAL from an order of the surrogate of Orange county, made in pursuance of chapter 394, of 1870, requiring the appellant to deliver to the defendant Ormsby as executor of her deceased husband, certain articles of personal property, and in case of her failure so to do ordering that a warrant issue.

The defendant William V. Tilton was a beneficiary in remainder under the will.

*Waring & Headley*, for the appellant.

*Scott & Hirschberg*, for the respondents.

BARNARD, P. J.:

The surrogate does not seem to have determined the question on which the order could be based. The plaintiff is the widow of Joseph Tilton, deceased. The will was executed July 24, 1875. The defendants are the executors of the will.

By chapter 394 of the Laws of 1870, it is provided that any executor who "shall have reasonable grounds to believe that any goods, chattels, credit or effects of the deceased \* \* \* shall not have

been delivered to such executor, \* \* \* and upon satisfying the surrogate of the county in which said letters shall theretofore have been issued, by affidavit, that there are reasonable grounds for suspecting that any such effects are concealed or withheld, such executor or administrator shall be entitled to a subpoena, \* \* \* to such persons as may be designated by said executor or administrator, requiring them to appear \* \* \* for the purpose of being examined touching the estate and effects of the deceased." After making provisions to compel attendance of such person when subpoenaed, the act provides, section 5: "If upon the inquiry it shall appear to the officer conducting the same that any effects of the deceased are concealed or withheld, and the person having the possession of such property shall not give the security in the next section specified for the delivery of the same, such officer shall issue his warrant directed to the sheriff, marshals and constables of the city or county where such effects may be, commanding them to search for and seize the said effects, and for that purpose, if necessary, to break open any house in the day-time, and to deliver the said property so seized to the executor or administrator of the deceased. \* \* \*" The executor procured a subpoena directed to Catharine Tilton, appellant under this act. She appeared and was not called. Evidence was given by the executor, tending to show that certain savings bank books and three notes, amounting to about \$600 together, belonged to the deceased. Mrs. Tilton appeared herself as a witness to prove a gift to her by her husband of the property in question, a few days before his death. I think the surrogate properly rejected her testimony. By section 398 of the Code, a witness cannot be excluded for interest in any court and before any person "acting judicially," except as qualified by section 399. This section 399 excludes all interested witnesses and persons from testifying to any personal transaction or communication with a deceased person, as against an executor. Mrs. Tilton comes within the person excluded by section 399. The surrogate was acting judicially in this inquiry. Mrs. Tilton then gave evidence tending to show the gift by her two daughters a short time before testator's decease and after the will was made. The surrogate, instead of finding that any effects of the deceased are concealed or withheld, finds that it was made to appear by the proofs taken on the application, "that there



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SECOND DEPARTMENT, FEBRUARY TERM, 1877.

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is reasonable ground to believe that certain goods, chattels, credits and effects of the deceased, and of which he had possession at the time of his death," specifying one savings bank book, one note made by Chambers for \$200, and two notes of Pallon, of \$200 each, "are concealed or withheld from the said executor by Catharine Tilton, the widow of the said Joseph Tilton, deceased." He has not found the gift to be good, or the contrary, only that there is reasonable ground to believe the property to belong to the estate after hearing the evidence. Satisfactory and reasonable belief justified the inquiry. What was the result of the evidence before the surrogate as to the title? He has not said this. The order for the warrant is also too broad. The order specifies distinctly the property which there is reason to believe appellant had in her possession belonging to the estate. Instead of ordering these items only to be delivered, and her house to be broken open to obtain them in case of refusal, the order includes "all the other property, goods, chattels, credits and effects of the said Joseph Tilton, deceased, in her possession or under her control at her place of residence." No evidence was given of any other property besides that specifically named, and yet by the order, if she should give that up, still her house may be broken open to search for unnamed and unproven property under a general search for the property of Joseph Tilton, deceased.

I think the order should be reversed, with costs.

GILBERT and DYKMAN, JJ., concurred.

Decree of surrogate reversed, with costs and disbursements.

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ISABELLA F. KINCAID, RESPONDENT, v. WILLIAM  
ARCHIBALD, APPELLANT.

*Statute of limitations—when bar of, removed by written promise to pay interest—  
Code, § 110.*

The plaintiff, in 1851, loaned to the defendant, her sister's husband, \$1,800, of which \$1,600 remained unpaid in the year 1861. In 1866 defendant paid \$200 thereon. In 1872, he signed and delivered to the plaintiff the following paper: "Received January, 1861, from Mrs. J. R. Kincaid the sum of \$1,600, for which I agree to pay interest, at the rate of seven per cent per annum, from this date. Paid January, 1866, to Mrs. Kincaid on the above \$200."

In an action to recover the amount due thereon :

*Held*, (1) that parol evidence was admissible to show the time of the execution and delivery of the paper.

(2) That, although it contained no express promise to pay the principal, yet, as it contained an explicit admission of an existing indebtedness and a promise to pay the interest thereon, that it was sufficient to remove the bar of the statute of limitations, which had run against the debt at the time of its delivery.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was brought to recover the amount of a debt alleged to be due to the plaintiff from the defendant, which was contracted in 1851. The defendant set up the statute of limitations.

*R. W. Van Pelt*, for the appellant.

*Ralph E. Prime*, for the respondent.

BARNARD, P. J. :

The sole question presented upon this appeal is the legal effect of a receipt given by defendant to plaintiff, in 1872. In 1851 or 1852, the plaintiff, at that time unmarried, lent to her sister's husband, the defendant, the sum of \$1,800. Payment was made on account of interest and principal between 1852 and 1861, when the balance unpaid was \$1,600. Two hundred dollars was paid by defendant to plaintiff on account of this \$1,600 in January, 1866. In August, 1872, the defendant gave plaintiff this paper :

"Received, January, eighteen hundred and sixty-one (1861), from Mrs. J. R. Kincaid, the sum of sixteen hundred dollars (\$1,600), for which I agree to pay interest at the rate of seven per cent per annum from this date. Paid January, 1866, to Mrs. Kincaid on the above, two hundred dollars (\$200).

"WILLIAM ARCHIBALD,  
"Yonkers."

The question is whether this paper is sufficient to revive the debt which was barred by the statute of limitations in August, 1872. The defendant claims that the paper not being dated, the promise to pay is, in legal effect, as if made in January, 1861. That there is no promise to pay the principal and that thereby there was no revival of the principal debt. I think the objection not well taken.

The paper must speak as of the time of its execution and delivery. When the date is omitted, or even wrongfully inserted, parol evidence may be given and fix the time of date. (*Draper v. Snow*, 20 N. Y., 331.) On the 2d of August, 1872, the defendant acknowledged that he had received \$1,600 of plaintiff for which he agreed to pay interest "from this date," clearly from the date of the loan just stated; he also, in this paper, acknowledged that he had paid on the loan \$200 in January, 1866.

No express promise to pay the principal was needed. An explicit statement that a loan was unpaid and that a present indebtedness existed, was sufficient to revive a debt before the Code. Giving a note for interest due was held a sufficient acknowledgment of the debt to take it out of the statute. (*Wenman v. Mohawk Ins. Co.*, 13 Wend., 267.) The Code (sec. 110) simply requires the acknowledgment or promise "to be in writing." This section was designed to introduce no new principle applicable to reviving stale demands, but solely to prevent the revival of such demands by loose oral declarations. The paper in question admits the original loan; agrees to pay interest; recites a payment of a portion of the claim some five years after its creation. I think it sufficient to revive the claim with the interest on it from the date of the advancement of the money.

Judgment affirmed, with costs.

GILBERT and DYKMAN, JJ., concurred.

Judgment affirmed, with costs.

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57	356

TEUNIS G. BERGEN, APPELLANT, v. ADOLPH GUBNA, AS  
SUPERVISOR, AND OTHERS, RESPONDENTS.

*Town hall—purchase of site for—application to supervisors therefor, under § 20, chap. 482 of 1875—what is proper.*

Upon the application of certain tax-payers of the town of New Utrecht, the board of supervisors ordered a special town meeting "to consider and decide the question of purchasing a site for a town hall." At a meeting held in pursuance of this order, a resolution was adopted "that the question be determined by ballot of the votes of this town meeting, whether a site shall be purchased for a town hall, and a building purchased or erected for such hall. \* \* \*"

Upon the return of an affirmative vote on this resolution to the board of supervisors, authority was given to the town to purchase the site and erect the hall, and to borrow money for that purpose. *Held*, that the resolution adopted by the town meeting was a sufficient compliance with section 20, chapter 482, of 1875, empowering the board of supervisors to authorize any town, *when application shall be made therefor* by vote of a majority of the electors \* \* \* to purchase a site for a town hall, and erect a building thereon.

The power conferred by this section is not restricted by chapter 197, of 1847, and chapter 157, of 1849, authorizing the erection of a town hall by the said town, and limiting the amount to be expended therefor.

**APPEAL** from an order made at the Special Term dissolving a temporary injunction granted in this action, and denying a motion to continue the same.

The action was brought by the plaintiff, a resident and tax-payer of the town of New Utrecht, in the county of Kings, to restrain the defendant Gubna, supervisor of said town, from issuing bonds in the name of the town to provide means for purchasing a site and erecting a town hall thereon, and to restrain the other officers of the town from co-operating with him.

*John Winslow*, for the appellant.

*John H. Bergen*, for the respondents.

**BARNARD, P. J. :**

By section 19 of chapter 482 of the Laws of 1875, the legislature enacted that "boards of supervisors should have power to provide for the calling and holding of special town meetings, to consider and decide any question upon which the electors of the town may be called to take action in accordance with the provisions of this act."

By section 20 of the same act, "power is given to the board of supervisors to authorize any town, when application shall be made therefor by vote of a majority of the electors voting on the question at any annual or duly called special town meeting, \* \* \* to purchase a site for a town or village hall, and to purchase or erect a building for such hall, and to raise money as may be necessary from time to time for the care, preservation and improvement of such hall."

On the 28th of June, 1876, a petition was presented to the board of supervisors of Kings county, from certain tax-payers of New Utrecht, asking the board to call a special town meeting "to consider and decide the question of purchasing a site \* \* \* for a town hall for said town."

The board ordered a special town meeting to consider and decide this question to be held on 11th July, 1876. At this meeting the electors voted by a large majority in favor of the following resolution:

*Resolved*, "That the question be determined by ballot by the votes of this town meeting, whether a site shall be purchased for a town hall, and a building purchased or erected for such hall, the amount to be raised by tax for such purpose not to exceed the sum of \$10,000, and money raised as may be necessary from time to time for the care, preservation and improvement of such hall." Upon the return of the vote on this resolution to the board of supervisors, it authorized the town of New Utrecht to purchase the site and erect the hall, and for that purpose to borrow money not exceeding \$10,000.

The plaintiff objects to the legality of the proceedings, because the vote of the town meeting was not to make the application to the board of supervisors, but upon the question of the willingness of the electors to purchase the site, and erect the hall. I think the objection of no weight. The object of the law is plain. The supervisors may, with the consent and on the application of the town, authorize it to buy the site and build the hall. The electors voted that a site should be purchased and a hall built.

Upon this the supervisors conferred the power. The consent of the town, and the authority of the board concur, and that is all which is called for by the act in question.

By chapter 197 of Laws of 1847, any town was authorized to vote a sum of money for the purchase of a site and building for a town hall, not exceeding in number of dollars twice the number of electors in the town. By chapter 157, Laws of 1849, New Utrecht was permitted to raise this amount in three equal installments.

In 1870, the electors of New Utrecht voted to raise all it could raise, \$900, for the site and hall. The money is now in the bank to the credit of the town.

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SECOND DEPARTMENT, FEBRUARY TERM, 1877.

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It is claimed that these laws are still in force, and that New Utrecht can proceed only under these laws. The power conferred upon towns and boards of supervisors by the act of 1875, is unrestricted. It covers all cases which come within its provisions. There is no question involved as to the repeal of the Laws of 1847 and 1849. These laws applied only to towns where there was no town-house, and limited the money which could be raised to obtain one. If there had been a \$900 town hall built under the law of 1847, it would be no reason why the town and board of supervisors could not obtain a better one under the law of 1875.

The order denying an injunction should be affirmed, with costs and disbursements.

DYKMAN, J., concurred. GILBERT, J., not sitting.

Order affirmed, with costs and disbursements.

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MARGARETTA P. BARNES, APPELLANT, v. SARAH JANE STOUGHTON AND CHARLES STOUGHTON, HER HUSBAND, RESPONDENTS, IMPEADED WITH WILLIAM DOUGHERTY AND JOHN A. CURRIER, APPELLANTS.

*Sale of mortgaged premises — power of court to direct sale of all the property for benefit of subsequent incumbrancers.*

In an action to foreclose a mortgage, upon the written application by the owner of the equity of redemption, and of all the parties to the action, including all persons who, at the time of the filing of the *lis pendens*, had liens upon the property, subsequent to that of the plaintiff, the court may order that all the premises be sold in parcels (though a portion thereof is of sufficient value to pay up the amount due the plaintiff), not only for the benefit of the plaintiff, but also for that of all subsequent incumbrancers and the owner of the equity of redemption.

APPEAL from an order made at the Special Term, reversing an order directing the manner in which the mortgaged premises described in the complaint in this action should be sold.

*James R. Marvin*, for the appellant Barnes.

*John A. Mapes*, for the appellants Dougherty and Currier.

*Dennis McMahon*, for the respondents.

BARNARD, P. J.:

The order should be reversed. The action was commenced to foreclose a mortgage for \$10,000, held by the plaintiff upon certain lands described in it. There were very numerous subsequent liens, some by mortgage and others by judgment. The original decree followed the usual form and directed the sale of the mortgaged premises, or such part thereof as should be sufficient to pay the mortgage debt and costs. After a sale under this decree, and after it had been set aside, because not made in parcels, all the parties to the action, including all who had existing liens at the filing of the notice of pendency of this action, made a written stipulation that the decree should be amended so that it should direct "that all of the premises be sold not only for the benefit of plaintiff, but also for all subsequent incumbrances and the said Sarah Jane Stoughton, the owner of the equity of redemption." The decree was amended on the 26th June, 1873, and a sale of all the property in parcels made.

At the sale, one of the purchasers declined to take title to two of the lots or parcels sold, known by the numbers 10 and 16. The purchaser was relieved from her bid, because no mention was made of a right of the public to include a portion thereof in a street. The action is now in this position: All the lands have been sold under this amended decree, except two parcels. The land sold has realized more than enough to pay plaintiff her mortgage and costs. It has not realized sufficient to pay all the liens on it represented by the parties signing the stipulation, and will not, if the two remaining pieces are sold for the extreme value claimed therefor by the owner of the equity of redemption.

By the order in question, the court, at Special Term, set aside and vacated the order amending the decree of June 27, 1873. This seems, from the provisions of the order, to have been done upon the ground that the court had no power to sell premises, except to pay the mortgage debt. The sale, so far as made, is legalized by a declaration in the order that Mrs. Stoughton is estopped from moving to set aside the sales already made; I think the court had the power to make the amended decree in question. It is given by statute. (2 R. S., 193, § 165.) By this statute power is given the Court of Chancery, if the mortgaged premises are so situated that the sale of the whole will be most beneficial to the parties, the decree may, in

the first instance, be entered for the sale of the whole. This power was exercised in *Beekman v. Gibbs* (8 Paige Ch., 511).

In an action to foreclose a mortgage, where a junior mortgagee was a defendant, the court ordered a sale to cover the plaintiff's debt, and all liens between it and the junior mortgagee including it. In this case (as appeared in *Livingston v. Meldrum* (19 N. Y., 440)) the decree was amended after the plaintiff's mortgage, debt and costs had been paid by sale of part of the premises. Application was made on the part of an alleged mechanic's lienor to sell the remaining premises, and upon consent being given by the parties it was so ordered. The power of the court was upheld.

Order reversed, with costs and disbursements.

GILBERT, J., concurred. DYKMAN, J., not sitting.

Order reversed, with costs and disbursements.

SARAH MARKEY, CLAIMANT, APPELLANT, v. EUGENE A. BREWSTER, EXECUTOR, ETC., RESPONDENT.

*Services rendered by one member of a family to another — recovery for — when proper.*

Defendant's testatrix being taken sick, sent for the plaintiff, her daughter, who had a family of her own, with whom she resided, to come and take care of her. Plaintiff accordingly left her home and resided with and took care of the deceased for nearly four years, during which time the deceased frequently said that the plaintiff should be well rewarded therefor.

In an action brought to recover the value of such services, after the death of the testatrix, *held*, that it was not to be classed with the ordinary cases of services rendered by one member of a family to another, and that plaintiff was entitled to recover.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

The action was brought by the plaintiff to recover the value of services rendered by her in nursing and taking care of her mother, the defendant's testatrix.

*Shafer & Hill*, for the appellant.

*Walter C. Anthony*, for the respondent.



BARNARD, P. J. :

The deceased was the mother of the plaintiff, but the plaintiff had a family of her own, and lived with her family some miles from the deceased. The deceased, on being taken sick and helpless, sent for her daughter, the plaintiff, to come at once and take care of her. This was in 1869. The plaintiff substantially gave all her time to nursing and taking care of her mother for the four years following. The deceased is proven to have repeatedly said during those four years "that plaintiff should be well rewarded;" "that she should receive a fair compensation or reward for her services;" "that she (deceased) would see she (plaintiff) was well paid for it (her services);" "that she intended to see the claimant paid;" "that she shall be well paid for it." Some of these declarations were made in the presence of plaintiff. There is nothing in the evidence tending to show that such compensation to plaintiff was to be made by will. Proof was offered by plaintiff to show that she received nothing under the will of the deceased, which was excluded. If such had been the understanding, and the same had not been complied with, an action at law for the value of the services could have been maintained. (*Robinson v. Raynor*, 28 N. Y., 494.) In the absence of proof showing a design to compensate by will, we think the action sustainable. The plaintiff was not a member of the family of deceased at the time of her employment by deceased. She was living in her own household. She never legally ceased to be a member of her own household, although absent at her mother's, under her mother's employment. The deceased repeatedly promised plaintiff should be paid. This case is not one to be classed with those cases where the services are to be gratuitous, as having been rendered by one member of the same family and household for another.

Judgment reversed and new trial granted, costs to abide event.

GILBERT and DYKMAN, JJ., concurred.

Judgment reversed and new trial granted, costs to abide event.

HUN—VOL. X. 3

## FRANCIS B. STRYKER, JR., RESPONDENT, v. PATRICK CASSIDY, APPELLANT.

*Mechanic's lien — chapter 478 of 1862 — meaning of the word "labor" — Architect not entitled to lien for services.*

The word "labor," as used in chapter 478 of 1862, providing that any person who shall hereafter perform any labor in building, altering or repairing any house shall, upon filing the notice required by that act, have a lien for the value of such labor, does not include the services rendered by an architect in superintending the erection of the house, and he is not entitled to a lien on the house for the value thereof.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was brought to foreclose a mechanic's lien filed under chapter 478 of 1862 for services rendered by the plaintiff, as an architect, in preparing plans and specifications and superintending the erection of the building against which the lien was sought to be enforced.

*H. C. Place*, for the appellant.

*Jos. M. Pray*, for the respondent.

BARNARD, P. J. :

The question presented by this appeal is, whether an architect is a person who can have a lien under chapter 478, Laws of 1862. The particular words under which the claim is made are as follows: "Any person who shall hereafter perform any labor, or furnish any materials in building, altering or repairing any house, building or other improvement upon lands or appurtenances to such house or other building by virtue of any contract with the owner \* \* \* shall, upon filing the notice \* \* \* have a lien for the value of such labor and materials upon such house," etc.

The plaintiff, as architect, superintended the erection of a house on defendant's land, by a contract with the defendant personally. I am unable to find any case involving a consideration of this section,

but the principle contended for has received adjudication. In *Ericsson v. Brown* (38 Barb., 390), the words of the "New York and Liverpool United States Mail Steamship Company" charter contained these words: "The stockholders of the said company shall be jointly and severally individually liable for debts that may be due and owing to all their laborers and operators, for services performed for said corporation." The plaintiff in that case, Mr. Ericsson, performed labor and services as a consulting engineer. It was held that he did not come within the section; that "laborers and operators" did not cover a consulting engineer; that the act was not designed to protect professional men. In *Aikin v. Wasson* (24 N. Y., 482), a contractor built a portion of a road bed for a railroad company. The law provided that "all the stockholders of every such company shall be jointly and severally liable for all the debts due and owing to any of its laborers and servants for services performed for such corporation. It was held that the contractor who performed labor himself with his men, did not come within the description of "laborer or servant" in the section referred to. It has been held in this court that a bookkeeper did not come within the term of section 18 of chapter 40, of Laws 1848, whereby the stockholders were made personally liable "for all debts due and owing to all their laborers, servants and apprentices, for services performed for such corporation."

I think services rendered by an architect do not come within the meaning of term "labor" under the lien law in question, and that the judgment should be reversed and a new trial granted at Special Term, costs to abide event.

GILBERT, J., concurred.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment reversed and new trial granted at Special Term, costs to abide event.

GOUVERNEUR PAULDING AND OTHERS, RESPONDENTS, v.  
GEORGE COOPER AND OTHERS, APPELLANTS.

*Contracts by public officers—duties of, as to payment—when personally liable thereon  
—Effect of a clause in contract exempting officers from personal liability.*

The defendants, commissioners appointed under chapter 720 of 1869, were authorized thereby to borrow \$10,000, and, in addition thereto, to issue town bonds, not exceeding \$20,000 per mile, to widen, grade and bridge a highway known as the eastern boulevard, the town authorities being directed to deliver the bonds to them as they might be needed. The plaintiffs contracted with the defendants to build a bridge upon said highway for \$19,864, to be paid in bonds. Upon applying to the commissioners for payment, after the completion of the work, they were informed that all the bonds authorized by the act had been issued to other persons for constructing the highway.

In an action by the plaintiffs to charge the defendants personally with the amount due under the contract, *held*, that they were entitled to recover.

*Held*, further, that their right to recover was not affected by the facts that the contract was made by the defendants as commissioners and not as individuals, and that it contained a clause providing that they should not be held to any individual liability whatever.

APPEAL from a judgment in favor of the plaintiffs, entered upon the trial of this action by the court without a jury.

The action was brought to charge the defendants personally with the amount due under a contract entered into by them, as commissioners of the eastern boulevard of the town of Westchester, for the construction of an iron bridge. The contract was made "between Abraham Hatfield, George Cooper, Hugh Lunney and Thomas Jay Bryne, not as individuals but as a body corporate, commissioners of the eastern boulevard of the town of Westchester, in the county of Westchester and State of New York, acting under authority of the law of the State of New York (chapter 720, 1869), parties of the first part," and concluded as follows:

"Inasmuch as the said commissioners, parties of the first part, are acting in a public capacity, they shall not be held to any individual liability whatever; and, also, inasmuch as the road is needed for public use without unnecessary delay, the party of the second part covenants to perform this contract within the stipulated time."

*Odle Close*, for the appellants.

*Oscar Smedburg*, for the respondents. The reservation in the contract exempting the defendants from individual liability has no

force whatever. (*Furnival v. Coombes*, 5 Manning & Granger, 736.) When an individual sustains an injury by the misfeasance or nonfeasance of a public officer who acts, or omits to act, contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case. (*Adsit v. Brady*, 4 Hill, 630; *Robinson v. Chamberlain*, 34 N. Y., 389; *Fulton Fire Ins. Co. v. Baldwin*, 37 id., 648; *Hover v. Barkhoof*, 44 id., 113; *Hicks v. Dow*, 42 id., 47; *McCarthy v. City of Syracuse*, 46 id. 194; *Johnson v. Belden*, 47 id., 130; *Clark v. Muller*, 54 id., 528; *Meriel v. Wymonsold*, 13 Car. II, Hardres' R., 205; *Horsley v. Bell* [1778]; 1 Brown's Chancery Cases, n, 101; S. C., Ambler's R., 770; 1 Brown's Parliamentary Cases, 396; *Higgins v. Livingstone*, 4 Dow's R., 341; see at pp. 355, 356; *Burrell v. Jones*, 3 B. & Ald., 47; *Lambert v. Knott*, 6 Dowling & Ryland, 122; *Parrott v. Eyre*, 10 Bing., 283; *Cullen v. Duke of Queensberry*, 1 Brown's Chancery Cases, 101; *Appleton v. Binks*, 5 East, 148; *Lancaster v. Tucker*, 1 Bing., 201; *Burls v. Smith*, 7 id., 705; *Doubleday v. Muskett*, 7 id., 110; *Hoskin v. Slaton*, Hardwick's Cases, 360.)

BARNARD, P. J. :

The legislature, by chapter 720, Laws of 1869, authorized the town of Westchester, in Westchester county, to borrow \$10,000 and to issue bonds of the town, not exceeding \$20,000 per mile, to widen, grade and bridge a highway in that town, known as the Eastern boulevard.

The defendants were appointed commissioners to widen make and construct the same. The work was required by the act to be done by contract. The commissioners were to make the contracts, and could, by the provisions of the act, require security for the faithful performance of the work by any contractor. The work could be done in sections, at the option of the commissioners. The town authorities were required to deliver to the commissioners, from time to time, as might be needed, bonds of the town for the purpose of the improvement of the highway. Under this act the defendants, as such commissioners, in the manner provided by this law, contracted with the plaintiffs to erect an iron bridge over the Westchester creek for the price of \$19,864, payable from time to time as the work progressed, in the bonds of the town. The plaintiffs

completed the bridge under the contract, and did the extra work incident thereto, and when the work is completed they are told that all the bonds have been issued which the act permitted, and that there is no fund with which to pay plaintiffs for the bridge. I think the defendants are plainly personally liable. They are public officers. They were charged with the duty of keeping the work within the limit authorized by the act, and whenever a contract was made they were charged with the duty of keeping the amount necessary to perform it. The contract made an appropriation, and it was the duty of the commissioners to keep it inviolate. The defendants must assume one of two positions, and either will uphold this action. They either contracted with plaintiffs in excess of their power, or they contracted with sufficient funds, and suffered those funds to be appropriated to other purposes. It was a violation of duty in either case. The plaintiffs have lost their labor and materials by it. Official neglect, and loss thereby to the plaintiffs specially, are thus made out. (*Adsit v. Brady*, 4 Hill, 630; *Robinson v. Chamberlain*, 34 N. Y., 389; *Fulton Fire Insurance Co. v. Baldin*, 37 id., 648.)

The defendants, commissioners, made a contract with one Dunn to build the abutment on which the bridge was to be placed, and the approaches to the bridge. This work was carried off by the flood, and the commissioners aver and prove that they were compelled to expend \$3,651.08 in replacing it. I think the fact clearly irrelevant to the plaintiffs. The defendants were bound to take such means as would provide for the execution of the contract by the Messrs. Dunn. They might take security or they might pay after work completed and tests made, or in some other way. The plaintiffs were charged with no duty in regard to it. The defendants could not use the money appropriated to pay plaintiffs, to rebuild the abutments. That would be incurring an obligation subsequent to plaintiff's contract, whereby the fund appropriated to meet it was impaired.

The judgment should be affirmed, with costs.

GILBERT, J., concurred; DYKMAN, J., not sitting.

Judgment affirmed, with costs.

SIDNEY H. STUART, APPELLANT, v. GEORGE W. PALMER,  
AS COLLECTOR OF TAXES OF THE TOWN OF NEW LOTS, AND THE  
TOWN OF NEW LOTS, RESPONDENTS.

*Assessment for local improvement—notice to parties affected by—when required.*

Where an act of the legislature requires the expenses of a local improvement to be assessed upon the property benefited, no notice of the time and place at which the assessors will meet to hear persons to be affected thereby, nor of the completion of the assessment, is required to be given, unless required by the terms of the act itself.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court without a jury.

This was an action in equity, to vacate an assessment imposed upon real estate of the plaintiff, on the ground that the same was a cloud upon his title thereto.

*James R. Adams*, for the appellant. The assessment and lien thereof is void and should be vacated and set aside, because it was made, levied and confirmed without any notice to the plaintiff or other property holders affected thereby. (Laws of 1870, chap. 619 § 3; *In the Matter of Ford*, 6 Lans., 92; *Ireland v. City of Rochester*, 51 Barb., 414; *Owners of Ground v. Mayor of Albany*, 15 Wend., 375; *Jordan v. Hyatt*, 3 Barb., 275; *In re Comrs. of Cen. Park*, 51 id., 277; *Sharp v. Johnson*, 4 Hill, 92; *Cruger v. Dougherty*, 43 N. Y., 119, 122; *People ex rel. v. Hurlburt*, 46 id., 110; *In re Flatbush Ave.*, 1 Barb., 286; *Hopkins v. Mason*, 42 How., 115; *Jackson v. Healey*, 20 Johns., 495; *Fonda v. Canal Comrs.*, 1 Wend., 288; *Rockwell v. Nearing*, 35 N. Y., 302; *Doubleday v. Newton*, 9 How., 71; *Sharp v. Spier*, 4 Hill, 76; *Fitch v. Comrs. of Highways*, 22 Wend., 132; *Taylor v. Porter*, 4 Hill, 140.)

*C. J. Lowrey*, for the respondents.

BAERNARD, P. J.:

By chapter 217, Laws of 1869, as amended by chapter 619, Laws of 1870, the legislature directs commissioners to be appointed by

the Supreme Court, whose duty should be to open and lay out Atlantic avenue, in the city of Brooklyn. These commissioners were also to assess the value of the land taken, and to assess the amount of the award and expenses upon the lands and premises benefited. Before making the assessment and awards public notice was required to be published in two or more public newspapers of the county of Kings, at least twenty days before the same were to be made, and of the time and place of meeting to make the same. There is no question made but that this notice was given. The report was made to the Supreme Court and the same was confirmed.

The act required the commissioners :

“SECTION 4. Upon the confirmation of said report” \* \* \*  
“the said commissioners shall be authorized to enter upon the lands and premises taken for said street or avenue, and cause the same to be properly regulated, graded, graveled, curbed, guttered, with crosswalks at intersecting streets, in such manner and in such place as shall in their judgment be necessary to make and preserve a suitable public street or avenue, and to assess the expenses of such regulating, grading, graveling, curbing, guttering, and crosswalks upon the lands and premises which, in their judgment, shall be benefited by such improvement, in proportion to the benefit accruing to them by reason thereof, the district of assessment to extend back as provided heretofore in this act. They shall certify such assessment with the names of the parties assessed to the supervisor of the said town, and the amount so assessed shall, together with interest at the rate of seven per cent per annum, from the time of making such assessment until the expiration of the warrant of the collection, be added by the supervisors of the county of Kings to, and make a part of the amount of taxes for the ensuing year upon the lands and premises upon which they are assessed, respectively, and shall be a lien thereupon, and be levied and collected in the same manner as other taxes are required by law to be collected, and when collected to be applied to the payment of the bonds to be issued and provided for in this act.”

By the preceding section the district of assessment was made to be three hundred feet on each side from the avenue. The assessment in question was made against the plaintiff under the fourth section and was solely for improving the avenue. The commis-



sioners, in making the assessment upon the strip of land for the improvement of the avenue under the fourth section, gave no notice of the meeting, and gave none whatever of the completion of the assessment, and gave no time for the presentation of grievances by those who were assessed. The question presented is, whether such omission to give notice was fatal to the assessment. The act required no notice of the assessment under this fourth section.

In *Owners of Ground v. The Mayor* (15 Wend., 374), it was held that only such notice need be given as was required by the act. The same principle was held in *The People v. The Mayor* (4 N. Y., 419). In the case before us no notice was required by the act. The exercise of a taxing power does not depend upon notice. It is an unlimited power. "However absolute the right of an individual may be, it is still in the nature of that right that it must be as a portion of the public burthens, and that portion must be determined by the legislature."

"The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the government acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property, and, as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right." (*The People v. The Mayor*, 4 N. Y., 419.)

I think the judgment should be affirmed, with costs.

GILBERT, J.:

The complaint in this case was properly dismissed. 1. A suit in equity does not lie against a collector of taxes to set aside the tax. 2. The tax complained of forms a part of the county tax. The original apportionment of the cost of the improvement, and the assessment of the sums apportioned upon the property benefited thereby, was confirmed by this court. No objection to the confirmation of that report appears to have been taken, and, in the absence of proof, in a collateral action of this kind, we are bound to presume that no valid objection to the proceedings existed. 3. No notice of the proceeding to levy a county tax, other than the general provision of the statute requiring the assessors to keep the

assessment rolls open for inspection and review during a specified period when the persons assessed may appear before them and make their objections, is necessary.

If the plaintiff has any remedy for the grievance of which he complains, it is very evident that this is not an appropriate one.

The judgment must be affirmed, with costs.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment affirmed, with costs.

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AUGUSTUS HILL, RESPONDENT, v. THE HIBERNIA INSURANCE COMPANY OF OHIO, APPELLANTS.

*Policy of insurance—meaning of words “standing detached” in—evidence as to their meaning among insurance men, inadmissible.*

Defendant issued a policy of insurance upon plaintiff's “two-story frame dwelling, composition roof, standing detached on the west side of Bennett avenue.” The house stood about seven feet from another house. In an action to recover for a loss sustained under the policy, the defendant offered to prove that the words “standing detached” meant, “amongst insurance men generally,” that the house was at least twenty-five feet from external exposure.

*Held*, that the evidence was properly rejected; (1) because there was no ambiguity in the meaning of the words; (2) because there was no offer to prove that the particular meaning sought to be given to these words was known to the plaintiff.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

This action was brought to recover the amount of a policy of insurance issued by the defendant upon a house belonging to the plaintiff, which had been burned.

*Wm. Sullivan*, for the appellant. The terms “standing detached,” when applied to a building insured, having acquired in the insurance

business a peculiar and technical meaning, different from their ordinary meaning, should be construed according to their sense in the insurance business. (Greenl. on Ev. [12th ed.], §§ 278, 280, 292, 295 *a*; 2 Starkie on Ev. [5th Am. ed.], § 565; *Hutchison v. Bowker*, 5 M. & W., 535; *Boorman v. Jenkins*, 12 Wend., 573; *Dickenson v. Water Comrs. of Poughkeepsie*, 2 Hun, 615; *Robertson v. French*, 4 East, 135; *Coit v. Com. Ins. Co.*, 7 Johns., 385; *Goodyear v. Ogden*, 4 Hill, 104; *Dawson v. Kettle*, *id.*, 106; *Dalton v. Daniels*, 2 Hilt., 472; *Walls v. Bailey*, 49 N. Y., 464; *Miller v. Stevens*, 1 Am. R., 139; *Sweet v. Shumway*, 3 *id.*, 471; 5 *id.*, 241, note; 6 *id.*, 678, note; *Brown v. Byrne*, 77 Eng. Com. L., 702; 1 Smith's Lead. Cases, by Hare & Wallace [6th Am. ed.], 828, *et seq.*; *Hutchison v. Tatham*, 6 Eng. R., by Moak, 232; *Appleman v. Fisher*, 34 Md., 540; *Whiting v. Boardman*, 118 Mass., 242; *Wadley v. Davis*, 63 Barb., 500; United States Dig., tit. "Usage;" *Goodrich v. Stevens*, 5 Lans., 230; *Standard Oil Co. v. Triumph Ins. Co.*, Ct. App., 1 Law and Equity, 512; Theory and Practice of Underwriting, by Rogers, p. 13; *Alexander v. Germania Ins. Co.*, Ct. App., 5 Ins. Law Jour., 360, May number.) The evidence excluded is material to the issue. If "*standing detached*" means at least twenty-five feet from external exposure, there is a breach of warranty and a material misrepresentation which relieve the defendant from all liability under the policy. (Flanders on Fire Ins., 204, 205, 208, 255; Bliss on Life Ins., 53, 54, 56, §§ 34, 37, 38; May on Ins., 160, 161; *McLoon v. Mutual Ins. Co.*, 100 Mass., 472; 1 Am. R., 129; *Ashworth v. Builders' Mutual Fire Ins. Co.*, 3 Ins. Law Jour., 489; *DeHahn v. Hartley*, 1 Term R., 385; *Fowler v. Aetna Fire Ins. Co.*, 6 Cow., 673; *French v. Chenango Mutual Ins. Co.*, 7 Hill, 122; *Jennings v. Same*, 2 Denio, 75; *Burritt v. Saratoga Mutual Ins. Co.*, 5 Hill, 188; *Mead v. Northwestern Ins. Co.*, 7 N. Y., 530; *Ripley v. Aetna Ins. Co.*, 30 *id.*, 136; *Pierce v. Empire Ins. Co.*, 62 Barb., 636; *Cushman v. U. S. Life Ins. Co.*, 4 Hun, 784; *Chase v. Hamilton*, 20 N. Y., 52; *Benedict v. Ocean Ins. Co.*, 31 *id.*, 394; *Brice v. Lorillard Fire Ins. Co.*, 55 *id.*, 240; *Chaffe v. Cattaraugus Co. Mutual Ins. Co.*, 18 *id.*, 376; 3 Kent's Com. [12th ed.], 376; 1 Parson's on Con. [5th ed.], 433; Clark on Ins., 121; *Burritt v. Saratoga Ins. Co.*, 5 Hill, 188; *Chase v. Hamilton*, 20 N. Y., 52; *Cazenove v. British Assur*

ance Association, 6 C. B. [N. S.], 437; *Anderson v. Fitzgerald*, 4 House of Lords Cases, 484.)

*Daniel T. Walden*, for the respondent. The language of the policy was plain; the words "standing detached" were not ambiguous, and therefore did not need any construction. Where a clause in a policy is clear in itself it ought to be understood literally. (Marshall on Ins., 212; *Reynolds v. Com. F. Ins. Co.*, 47 N. Y., 605; *Rann v. The Home Ins. Co.*, 59 id., 387; *White v. Hudson R. Ins. Co.*, 15 How. Pr., 288, per Cady, J.; *Mut. Ins. Co. v. Hone*, 2 N. Y., 243, 244.)

BARNARD, P. J.:

The defendant issued to the plaintiff a policy of insurance on the 5th of January, 1874, to expire in one year. The subject of the insurance was "the two story frame dwelling, composition roof, standing detached on the west side of Bennett avenue, about 125 feet north of Duryea avenue, east New York, Long Island."

The house was entirely destroyed on the 17th of June, 1874. At the time of the insurance this house was unoccupied, and so continued until the fire. The house stood about seven feet from another house. Upon the trial the defendant offered to show that the words "standing detached" in a policy meant, "amongst insurance men generally," that the subject of the insurance should be at least twenty-five feet from external exposure. This offer was rejected, and the plaintiff had a verdict. The defendant makes two principal objections to the recovery:

First. That the word "dwelling" in the policy imports a warranty that the building was then occupied as a dwelling, and being broken, the policy was void.

Second. That it was error to exclude the evidence as to the special meaning of the words "standing detached."

The first objection under the evidence seems untenable, and hardly consistent with good faith. There was an application in writing for the policy. This application is in the defendant's possession, and is not produced. Plaintiff's agent, Bond, testifies that defendant's agent, Carroll, wrote down the application, and that he, Bond, told him that it, the house, was then unoccupied. If the policy had

mentioned this paper, it would have been a part of the policy by its express terms. As it is, if the policy is made out different from the application, the policy should conform to it. Carroll, defendant's agent, does not deny that there was a written application, but says that Bond left it — importing that Bond drew it. No matter who drew it, the evidence is conclusive, that the written paper contains a statement that the house was unoccupied. Bond says Carroll drew it from what he stated, and that the fact of the house being unoccupied was a part of it. Carroll says, I don't remember Bond telling me so, but "he left a written memorandum of what he wanted." In filling out the policy, Carroll was defendant's agent, and his error in filling out the policy should not destroy the policy. (*Rowley v. The Empire Insurance Company*, 36 N. Y., 550.)

As to the second objection taken by defendants, there are two reasons why it should not prevail.

First. There is no ambiguity in the words "standing detached."

Second. There is no offer to prove that the particular meaning claimed for the words was known to the assured. When the usage is as to a particular trade or profession, a party to be bound by it "must be shown to have knowledge or notice of its existence." (*Wells v. Baily*, 49 N. Y., 464.)

I think the judgment should be affirmed, with costs.

GILBERT, J., concurred. DYKMAN, J., not sitting.

GILBERT, J. :

The defense in this case seems to be entirely destitute of merit. The company received a verbal notice of the loss immediately after the fire, and nine days after the fire proofs of loss were served, which also contained a formal written notice of the loss. All these were received and retained without objection, and the company put its refusal to pay the loss upon other grounds than a non-compliance with the conditions of the policy in relation to these matters. Such conduct is a waiver of the strict performance of such conditions.

The building insured is described in the policy as a dwelling as and "standing detached." This is the language of the insurer. No survey or statement, showing whether the building was occupied or

not, or the distance between it and adjacent buildings was required of the assured or furnished by him. The insurance was effected through a broker, who had been engaged in that business twenty years. He testified that he informed the insurer before he effected the insurance that the building was vacant, and that he was willing to pay an extra premium on that account.

We think that the use of the word "dwelling" does not imply that the building is occupied, but if it does, the use of it by the insurer alone does not create a warranty by the assured. The question whether the fact that the building was vacant, was fraudulently suppressed by the assured, was fairly submitted to the jury, and their conclusion upon it is fully supported by the evidence. The defendants having knowingly insured a vacant building, the condition, that if the building should afterwards become vacant, or unoccupied, without their assent indorsed on the policy, affords them no shield. That condition by its terms applies only to an insurance upon an occupied building, which is vacated after the insurance was effected.

The building did stand detached. It was seven feet from any other building. The attempt to show that the phrase "standing detached" meant that it was distant twenty-five feet, or thereabouts, from any other building, was properly rejected. The phrase is not in the slightest degree ambiguous, and extrinsic proof was not admissible to give it a meaning different from its plain import. A new contract cannot be made in that way. (*Reynolds v. Commerce Insurance Company*, 47 N. Y., 605.)

We have discovered no error in the rulings upon the trial, or in the charge to the jury.

The judgment must be affirmed.

BARNARD, P. J., concurred. DYKMAN, J., not sitting.

Judgment and order denying new trial affirmed, with costs.

PETER VAIL, RESPONDENT, v. IRA B. TUTHILL, APPELLANT.

*Judgment on accounting — Assumption of outstanding claim operates as a transfer of it — Evidence.*

This action was brought by the plaintiff to recover the value of certain wood sold to the defendant, who, with one Deen, were manufacturing brick as assignees of one Horne. The wood was sold upon the agreement of the defendant to be personally responsible therefor. The defendant set up a counter-claim for bricks sold by him and Deen to the plaintiff. Upon the trial the court refused to receive in evidence a judgment recovered after the commencement of this action, in an action brought against the defendant, Tuthill, and Dean, as assignees for an accounting, in which Tuthill charged himself with the price of the brick as so much money received from the plaintiff. *Held*, that the judgment should have been received in evidence, although recovered after the commencement of this action, and that as it appeared thereby that the defendant had become the owner of the claim against the plaintiff, he was entitled to set it up as a counter-claim in this action. (DYKMAN, J., dissenting.)

APPEAL from a judgment of the County Court of Suffolk county, affirming a judgment in favor of the plaintiff, recovered in a Justice's Court.

*George Miller*, for the appellant.

*Wm. Wickham*, for the respondent.

BARNARD, P. J.:

A Mr. Horne, who was a manufacturer of brick, of Robbins island, Suffolk county, became embarrassed and assigned his business to defendant and a Mr. Deen to close up the same, and from the proceeds to pay the laborers, and claims which defendant Tuthill held against Horne. Tuthill was the sole actor in the assignment. It seems a Mrs. Moffit was in some way bound to pay defendant's claims against Horne, as security for Horne. The assignment was made in October, 1873. The plaintiff brought wood to the yard and exacted a personal liability upon the part of defendant to pay for the same. The amount of wood and profit was \$105.50. At the same time he received 12,000 bricks for the price of ninety-six dollars, leaving a balance of nine dollars and fifty cents, for which he brings this suit. On the 10th November, 1873, the plaintiff

received another 12,000 of brick at the price of ninety-six dollars, and the defendant seeks to set off this claim in extinguishment of the plaintiff's claim, and asks judgment for the balance. The plaintiff's claim was undisputed. The defendant gave evidence tending to show that he was the sole acting assignee. That the property did not realize enough to pay his, defendant's, claims. That the other claims in the assignment were all paid. That, in November, 1874, Mrs. Moffit commenced an action against him and Deen for an accounting under the assignment. That in the defendant Tuthill's answer, he charged himself with this claim on the 4th December, 1873, as if the money had been received by him.

The action was not finally disposed of until after this action was tried before the justice, but resulted in a judgment based upon the defendant's answer, as to the claim in question before the trial in the County Court. The court rejected the judgment roll. I think this was erroneous. The judgment determined the existence of the facts necessary to support it, even as against a stranger. The judgment was complete evidence of title to the demand. It was none the less evidence because it was recorded after the present action was commenced. The plaintiff had no title to be overreached by the decree. If he had, the decree would not affect him. As between Moffit, Horne, Deen and defendant, it established the title of defendant to his claim. (*Fuller v. Van Geeson*, 4 Hill, 171.)

The plaintiff's wood was burned in the manufacture of the brick made at Robbins island. It is really a claim legally against both assignees. The plaintiff gave the credit to defendant only, and therefore can sue him alone, but still equity and justice requires the offset if it can be legally made. By the aid of the judgment roll defendant would have such an equitable right to the claim, individually, as would permit the offset.

I think the judgment should be reversed and a new trial granted, costs to abide event.

DYKMAN, J. (dissenting):

This cause originated in a Justice's Court, was afterwards tried on appeal in the County Court of Suffolk county, and now comes to us on appeal from the judgment rendered in favor of the plaintiff. The plaintiff's claim is as follows:



SECOND DEPARTMENT, FEBRUARY TERM, 1877.

Eighteen cords of wood, at four dollars and seventy-five cents .....	\$85 50
Freight .....	20 00
	<u>\$105 50</u>
Credit: Twelve thousand brick, at eight dollars.....	96 00
	<u>\$9 50</u>

The defendant's claim against the plaintiff is as follows:

1873. October 10. Twelve thousand brick, at eight dollars,	\$96 00
1873. November 4. Twelve thousand brick, at eight dollars.. .....	96 00
	<u>\$192 00</u>
Credit: Ten loads wood, four dollars and seventy-five cents per load.....	\$85 50
By freight, twenty cords, at one dollar a cord....	20 00
	<u>105 50</u>
	<u>\$86 50</u>

It will be thus seen that the difference between the parties arises upon the 12,000 of brick of November 4, 1873. If the plaintiff is to be charged with these brick in this action, then the judgment is wrong, and must be reversed; but if the court was right in rejecting this item, then the judgment must be affirmed. The court decided that the only question to be submitted to the jury was the claim of the plaintiff in his complaint, and that all matters alleged in the defendant's answer should be excluded from their consideration on the ground that the claim of the defendant was not an individual claim, but a claim in his favor jointly with William M. Deen.

There was no controversy over the plaintiff's claim, and the court, at the close of the testimony, directed a verdict for the full amount of it in the plaintiff's favor. The item of the defendant's claim, which is thus rejected, was for brick from Robins island. These brick, and all the other movable property on the island, were placed in the hands of the defendant and William M. Deen, as trustees, to be sold and disposed of by them and the proceeds applied by them in a certain way. The brick were

not, therefore, the individual property of the defendant, and even though they were sold and delivered to the plaintiff, yet they were not the proper subject of a set-off in favor of the defendant in an action against him alone. He could not avail himself of this item as a set-off, any more than he could maintain an action on it in his own name alone. Nay, not so well, for as he had no individual interest in the claim at all, he could not be permitted to make use of it to extinguish a personal claim against himself individually. The County Court, however, rejected the claim as an offset or counter-claim, on the broad ground that the defendant was not the sole owner of the claim. The defendant attempted to avoid this difficulty by showing that he had rendered an account as such trustee, and that the two items of brick, which he had charged to the plaintiff, had been charged to himself in these accounts, and that he had become personally liable for them, or rather had assumed them in such accounting.

There are two answers to this proposition. The first is, that if the defendant ever did become liable to pay these items as between himself and his principal, it was not until after the commencement of this action, and they were not valid and existing claims in his hands at the time of the commencement of this action, and they must have been such to make them the proper subject of offset in this action. In the next place, even though the defendant did render an account of his transaction as such trustee, in which he charged himself with these two items, and thus became liable for their payment, as between himself and his principal, did that give him such a title to these items as enabled him to use them in an action in any way; could he maintain an action upon them in his own name? We think not, but it is not necessary now to decide the question.

We think, therefore, that it results from this examination that there was nothing for the jury, and that the county judge was right in directing a verdict for the plaintiff.

Judgment affirmed, with costs.

Present—BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment and order denying new trial reversed, and new trial granted, costs to abide event.

ROBERT P. KNAPP, APPELLANT, v. ALFRED B. POST,  
RESPONDENT.

*Setting aside judgment — not granted on a second motion, after denial of motion for new trial on judge's minutes.*

After a motion for a new trial has been made upon the minutes of the justice before whom the action was tried, and by him denied, it is error for another justice to entertain and grant another motion to set aside the judgment on the ground of "error and manifest injustice."

A new trial can only be granted in such a case upon an appeal from the first order.

APPEAL from an order made at Special Term setting aside and vacating a judgment in this action, and granting a new trial.

*George W. Green*, for the appellant.

*Bacon & Duryea*, for the respondent.

GILBERT, J. :

This action was tried before Mr. Justice BARNARD and a jury, and resulted in a verdict for the plaintiff. At the close of the trial the defendant moved for a new trial on the minutes. Such motion was argued on a subsequent day, and denied. Thereupon, judgment was entered November 24, 1875. In January following, the defendant made a motion before Mr. Justice DYKMAN upon all papers and proceedings in the cause and upon affidavits, for a new trial, on the ground of surprise, newly discovered evidence, manifest injustice and error in the evidence and verdict of the jury. That motion was denied January 10, 1876, without prejudice to the right of the defendant to make the same motion *on the case made*, as might be proper. Afterward the case was settled. Then the defendant moved, before Mr. Justice DYKMAN, upon that, together with the papers used on the preceding motion, for a new trial upon other grounds, namely: error and mistake in the witnesses, and of manifest injustice having been done the defendant by the evidence and verdict. This motion was granted, and the plaintiff's judgment was vacated.

It will thus be seen that, after a motion upon the minutes had

been denied by the judge who tried the cause, and after a motion on the ground of surprise and newly discovered evidence had been denied by Judge DYKMAN, the last-named judge made the order appealed from, on the ground of error and manifest injustice.

We are of opinion that the proceeding is altogether erroneous. It was nothing more than a retrial of the cause upon affidavits. If the practice here pursued should be authoritatively established, few verdicts would stand. It costs defeated parties little effort to show by *ex parte* affidavits that their defeat is attributable to error and manifest injustice, rather than their own neglect or mistakes, and it is far easier to get rid of a verdict and judgment in that way than by appeal. But the law does not allow such a practice. The first motion before Judge DYKMAN was properly made and properly disposed of, for no case of surprise or of newly-discovered evidence, within the legal meaning of those terms, was shown; or if not properly disposed of, the remedy was by appeal from the order. The last motion was simply an appeal from Judge BARNARD to Judge DYKMAN, unless, indeed, "error and manifest injustice" in a judgment may be shown by affidavit, which, as already said, the law does not allow. The remedy of the party injured by such error and injustice is by appeal. (*Kamp v. Kamp*, 59 N. Y., 212.)

The order appealed from should be reversed with ten dollars costs and disbursements, and the clerk should be directed to reinstate the judgment.

DONOHUE, J., concurred.

Present — GILBERT and DONOHUE, JJ.

Order reversed, with costs and disbursements.

MICHAEL DONOHUE, RESPONDENT, v. THE MAYOR, ETC.,  
OF THE CITY OF NEW YORK, APPELLANTS.

*Contract — Error in certificate of engineer as to price — Voluntary payment — Corporation — not bound, by unauthorized payment by agents — Negotiable certificates of indebtedness — effect of transfer thereof.*

The plaintiff's assignor entered into a contract with the trustees of the town of Morrisania, by which he was to receive fifty cents per yard for all filling made thereunder. Subsequently the engineer gave a certificate in which the price was stated at seventy-five cents per yard, and certificates of indebtedness for the amounts of the bills so certified were issued by the board of trustees of the said town. *Held*, that as the engineer and trustees were only the agents of the corporation, it was not bound by their unauthorized acts, and that the payment could not therefore be regarded as a voluntary one.

Negotiable certificates of indebtedness were issued to the contractor, who thereafter transferred them to purchasers in good faith. *Held*, that he thereby made himself liable for the value of the certificates so transferred.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

This action was brought by plaintiff, as assignee of Patrick Handibode, to recover a balance of \$4,547.40, alleged to be due on a contract made November 6, 1872, between the trustees of the town of Morrisania and said Handibode, for grading One Hundred and Thirty-sixth street.

The defendant set up in its answer, as a counter-claim, that plaintiff, at the time of the indebtedness alleged, was the assignee of said Handibode, in another contract made between the same parties for grading One Hundred and Forty-fifth street, and had, "through error and mistake of fact," received from the defendants an excess over what was due him of \$2,200.

It appeared upon the trial, that by the terms of the written contract for grading One Hundred and Forty-fifth street, the contractor was entitled to receive for furnishing and depositing earth filling, fifty cents per cubic yard. That the engineer in charge of the work had certified an embankment, necessarily thus constructed thereon, as containing 10,969 cubic yards, at the price of seventy-five cents, instead of fifty cents per cubic yard, making an erroneous excess in

plaintiff's favor of \$2,742.25. That thereafter, and on November 12, 1873, the board of trustees issued eight certificates of indebtedness on account of said work, to the contractor, the aggregate amount whereof (\$3,410.29) more than covers the amount of said mistake, and that the same were delivered to him, and subsequently transferred to a *bona fide* purchaser for full value, before the maturity thereof.

The referee refused to allow the defendant's counter-claim.

*A. J. Requier*, for the appellants.

*Herring & Samson*, for the respondent.

GILBERT, J.:

The case clearly shows that the plaintiff received the over-payment which is the subject of the counter-claim, and the referee should have so found. The error arose from the fact that the engineer in charge of the work done by the plaintiff and his assignor, certified seventy-five cents instead of fifty cents per yard for filling, the latter sum being the contract-price. The engineer had no authority to give a certificate, nor the board of trustees to make a payment in excess of the contract-price. They were respectively mere agents of the corporation, and their principal was not bound by their unauthorized acts. Such a payment is not a voluntary one by the corporation. The case of *Board of Supervisors v. Ellis* (59 N. Y., 620) is a full authority on this point.

It appears that the plaintiff received the over-payment in the form of negotiable certificates of indebtedness, whereby the corporation became bound to pay the amount thereof at a future day, and that he immediately transferred them to a purchaser in good faith and for value. The corporation has thus been deprived by the act of the plaintiff of any defense to its liability on the certificates (*Seybel v. Nat. Currency Bk.*, 54 N. Y., 298; *McSpedon v. Troy City Bk.*, 3 Abb. Ct. App. Dec., 133), and such act is conclusive that the plaintiff appropriated them as a payment upon his contract. (*Herring v. Sanger*, 3 Johns. Cas., 72; *Elwood v. Deifendorf*, 5 Barb., 408.) But, whether treated as a technical payment or not, the plaintiff is clearly liable for the value of the certificates by rea-

son of his having parted with them, and so put it out of his power to return them to the defendant.

The judgment must be reversed, the order of reference vacated and a new trial granted, with costs to abide the event.

BAERNARD, P. J., and DYKMAN, J., concurred.

Judgment reversed and new trial granted at Circuit.

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RICHARD S. VAN WYCK, RESPONDENT, v. LOUISA M. BAKER AND EMILE BENEVILLE, APPELLANTS.

*Fraudulent conveyance—remedy of creditor—power of court to direct a sale by its officers of real estate fraudulently conveyed.*

The Supreme Court has no power to effect a transfer of the title to land by directing a sale thereof by its officers, except in special cases authorized by the statutes of the State.

In suits by creditors to reach lands conveyed with intent to defraud them, the decree should set aside the fraudulent conveyance and permit the creditor to issue an execution and sell thereunder, or compel the debtor to convey to a receiver, and order the latter to sell.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court, without a jury.

The action was brought by a judgment creditor of the defendant Louisa M. Baker, to set aside, as fraudulent, a conveyance of certain real estate from her to the defendant Emile Beneville.

The court found that for some years prior to the conveyance the defendant Baker was indebted to the defendant Beneville in the sum of \$1,015, with interest on portions thereof, from different times; that the conveyance was executed with the intent to hinder, delay and defraud creditors, and adjudged that the deed was fraudulent and should be canceled; that the premises should be sold by the sheriff of Westchester county; that from the proceeds of sale there be paid to the defendant Beneville the amount due to him; that from the balance of said proceeds there should be paid to the plain-

tiff the amount of his debt, and any balance remaining should be paid to the judgment debtor.

*Israel Minor, Jr.*, for the appellants.

*John Gibney*, for the respondent.

GILBERT, J.:

The judgment is erroneous in ordering a sale of the real estate without providing for a conveyance by the judgment debtor, and in directing the balance of the proceeds, after paying the plaintiff and Beneville, to be paid to the judgment debtor. The court has no power to effect a transfer of title to lands in that way, except in special cases authorized by statute, such as mortgage and partition cases, sales of infants' lands, ordinary execution sales and the like. In suits by creditors to reach lands conveyed with intent to defraud them, the proper decree is to set aside the fraudulent conveyance, and permit the creditor to issue an execution, and sell under that, or compel the debtor to convey to a receiver, and order the latter to sell. The fraudulent deed being annulled, the title remains in the debtor, and can be passed only by her deed. (*Jackson v. Edwards*, 7 Paige, 404; *Bank v. White*, 2 Seld., 236; *Bank v. Risley*, 19 N. Y., 369.) The deed from the judgment debtor to Beneville, if fraudulent, was not void, but voidable only at the election of creditors. It was valid between the parties to it. The defendant Beneville, in any view of the case, therefore, would be entitled to all that might remain of the land or the proceeds thereof, after satisfying the claim of the plaintiff. We might modify the judgment in the particulars referred to, but we are not satisfied that the evidence is sufficient to warrant a decree annulling the deed on the ground of the fraud upon creditors alleged.

The judgment, therefore, will be reversed and a new trial granted, with costs to abide the event.

BARNARD, P. J., concurred. DYKMAN, J., not sitting.

Judgment reversed and new trial granted, costs to abide event.



GEORGE J. PENFIELD AND OTHERS, EXECUTORS, ETC., APPELLANTS, v. WILLIAM W. GOODRICH, IMPEADED WITH OTHERS, RESPONDENT.

*Conveyance subject to mortgage — effect of agreement by mortgagee to extend time of payment.*

Where a mortgagee enters into an agreement with one to whom the property has been conveyed subject to the mortgage, extending the time of payment thereof, he does not thereby release the mortgagor from his liability upon the bond executed at the time of the giving of the mortgage.

APPEAL from a judgment entered upon the report of a referee.

This action was brought for the foreclosure of a mortgage upon real estate. The mortgage and the bond accompanying it were executed by the defendant William W. Goodrich on the 18th day of December, 1871, to the Knickerbocker Life Insurance Company, to secure the payment of \$5,000 and interest and were assigned by that corporation to the plaintiffs, as executors, on the 17th day of September, 1873. The complaint, as amended, was in the usual form, and contained a prayer for judgment for deficiency (if any) against the defendant Goodrich, who answered, alleging that after the execution of the bond and mortgage he sold the property subject to the mortgage, and that the same subsequently passed by several mesne conveyances to one Mary A. Van Alen; and that thereafter, by an agreement between the plaintiffs and said Mary A. Van Alen, the time for the payment of the principal of the bond and mortgage was extended without his knowledge or consent.

The issues having been referred the cause was tried before the referee, who reported granting to plaintiffs a judgment of foreclosure and sale, but refusing to allow a judgment for a deficiency against the defendant Goodrich, on the ground that the time for the payment of the mortgage had been extended without his knowledge or consent.

Judgment having been entered in accordance with the report, the plaintiffs appealed from so much of the same as adjudged that an agreement to extend the time was made, and that the defendant

Goodrich was released thereby. Also from an order denying a motion for a new trial.

*Wm. G. Nicoll*, for the appellants.

*Wm. W. Goodrich*, respondent, in person. The extension and alteration of the bond discharged the bondsman. (See *Bancker v. Mayor*, 8 Hun, 409; *Calvo v. Davies*, id., 222; *Thorp v. The Keokuk Coal Co.*, 48 N. Y., 258; *Nichols v. Ash*, 3 N. Y. Weekly Dig., p. 10, Aug. 14, 1876.) The land is the primary fund for the payment of the mortgage, and any dealing which puts it out of the power of the mortgagee to proceed against that fund, discharges the bondsman who stands in the light of a surety. (*Jumel v. Jumel*, 7 Paige, 591; *Harris v. Jew*, 66 Barb., 232; *Freeman v. Auld*, 44 N. Y., 50; *Nichols v. Ash*, above cited.)

GILBERT, J.:

It is of the essence of suretyship that there be a principal obligation, for the performance of which the surety has undertaken. Nor can a person at the same time bear toward his creditor the relations both of principal debtor and surety. In this case the bond and mortgage were made by Mr. Goodrich. Afterwards he conveyed the mortgaged premises subject to the mortgage, and through several mesne conveyances the title to the premises has become vested in Mrs. Van Alen, the present owner; but neither of these grantees assumed or became personally bound to pay the mortgage debt. The bond of Mr. Goodrich is the only personal obligation held by the plaintiffs for the payment of the indebtedness due them. A grantee of land subject to a mortgage incurs no personal liability to the mortgagee. The conveyances in this case, therefore, had no effect upon Mr. Goodrich's liability upon his bond. By that instrument he became the principal and only debtor, and such he has ever since continued to be. If the grantee, in his conveyance referred to, had assumed the payment of the mortgage debt, a different question would have been presented. In such a case, it might properly be contended that such grantee, by his assumption of the payment of the mortgage debt, had become the principal debtor, and that the liability of Mr. Goodrich had been changed to

that of a surety merely. Whatever may be the rule of equity in such a case, we are clear that no such change is wrought by means of a conveyance of land subject to a mortgage. It is true that the land conveyed became the primary fund for the payment of the mortgage debt, so that in case Mr. Goodrich pays the debt, he will, in equity, be subrogated to the rights of the plaintiffs as mortgagees. But those rights will belong to him, not because he is a surety, but because he has discharged a debt which is a lien upon land conveyed by him subject thereto, and it is but just and equitable that, having paid the debt for which the land is primarily bound, he should be substituted in the place of the creditor, and succeed to his rights.

There is, it must be confessed, much similarity in the position of Mr. Goodrich to that of a surety, and if the land could be indued with the qualities of a person, the analogy would be complete. But the rule which discharges a surety on account of the creditor's dealings with the principal debtor has not, to my knowledge, been applied, except in cases where the technical relations of principal and surety existed. Even where the contract is in form one of suretyship, and the obligation of him who is nominally the principal debtor is voidable or void for lack of capacity to contract, as in the case of infants and married women, the surety has been held liable at law as upon an original undertaking. (*Harris v. Huntbach*, 1 Burr. 373; *Kimball v. Newell*, 7 Hill, 116; *Erwin v. Downs*, 15 N. Y., 575.) And there appears no reason why equity should not follow that rule. If the bond in suit had been given after the conveyance to Mrs. Van Alen, for her benefit, and she had made the mortgage, there would have been no reasonable ground for claiming that Mr. Goodrich's liability was aught but that of a principal debtor. In that case, as in this, the land would have been primarily bound, but that fact would not have clothed Mr. Goodrich with the character of a surety, nor altered the legal effect of his bond, and we see no reason why it should have that effect in the case before us.

This conclusion renders it unnecessary to examine the other questions presented.

The part of the judgment appealed from and the order refusing

a new trial should be reversed, and a new trial should be granted, with costs to abide the event.

Present — GILBERT and DYKMAN, JJ. BARNARD, P. J., not sitting.

Part of judgment appealed from reversed, and new trial granted at Special Term, with costs.

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AUGUST MULLER, RESPONDENT, v. JOHN McKESSON AND DANIEL C. ROBBINS, APPELLANTS.

*Ferocious animals — liability of owner of.*

The plaintiff, who was employed in the defendants' factory, while passing through the yard, early in the morning to admit the other operatives to the factory, was attacked and severely injured by a large Siberian bloodhound, owned by the defendants, and of whose vicious habits and dangerous character they had full knowledge. The dog was kept chained during the day, and let loose at night; it being the duty of the defendants' engineer to chain him up before the workmen were admitted.

Upon the trial of this action, brought to recover damages for the injuries so sustained, it was insisted that, as the accident occurred through the negligence of a co-servant in omitting to chain up the dog, and as the plaintiff had knowledge of its vicious habits, he could not recover. *Held*, that the defense was properly overruled.

Duties and liabilities of owners of ferocious and vicious animals considered.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

*Charles H. Mundy*, for the appellants.

*F. A. Ward*, for the respondent.

DYKMAN, J. :

This is an action to recover damages for the bite of a dog. The plaintiff was in the employ of the defendants in their chemical factory in the city of Brooklyn, where they kept a large Siberian

bloodhound as a watch dog. The dog had been purchased for the defendants by their superintendent a short time before he bit the plaintiff, and was kept in the yard of the factory, chained by day and loose by night. It was a part of the duty of the plaintiff to open the gate of the factory yard in the morning, for the purpose of admitting the operatives into the yard and factory. On the morning of October 21, 1873, as the plaintiff was returning from the gate after opening it, he was attacked by this dog, thrown to the ground bitten on his posterior, on his arm, and on his ear; the lacerations were quite deep and severe, and the injuries were quite painful. The dog had before this bitten the superintendent of the defendants, and he had informed the general agent of the defendants of the fact, and when the superintendent purchased the dog for the defendants he was told that the dog was bad and would bite. After the plaintiff was bit he was attended by a physician until he was convalescent, but his hand is permanently disabled.

The cause came on to be tried at the Circuit, and the foregoing facts were entirely uncontradicted. At the close of the testimony, the court decided that the defendants were liable, and that the action was made out against them, and refused to submit any thing to the jury except the question of damages. That question was submitted to the jury, and a verdict was found in favor of the plaintiff for the sum of \$1,500.

The defendant has appealed from the judgment entered upon the verdict, and has made no application for a new trial either on the minutes or at Special Term. Only questions of law, therefore, can be examined, and the questions which must be examined and determined are, is the plaintiff entitled to recover in the action, and did the judge at the Circuit do right in refusing to leave any question to the jury, except the question of damages?

The common law of England and America has established a doctrine in relation to the rights, duties and liabilities of the owners of domestic animals, which is wise and just and even-handed in its operation, both as to society and individuals. By this law dogs, horses, and all animals which are domestic in their nature, are placed on the same ground, and any person may keep any of them for his use, his pleasure or his protection, or for any lawful purpose that his tastes or inclinations may dictate; and such keeping is perfectly law-

ful until some vicious propensity is developed and brought to the knowledge of the owner; but after such development and such knowledge the owner is liable for all the injuries which the animal may perpetrate in obedience to such propensity.

A distinction is made between animals *feræ naturæ*, of a ferocious or mischievous nature, and animals *mansuetæ naturæ*, of a ferocious and mischievous disposition. In relation to the former, if they are liable to attack or injure human beings, a recovery can be had against the owner for an injury by them without proving the *scienter*, while in relation to the latter no recovery can be had without proving previous knowledge of the vicious propensity of the animal. The same legal rights exist to keep animals of the former kinds as of the latter, the only difference being that as to the first the owner is amenable without notice of their vicious propensities, while as to the latter notice or knowledge is required; and the justness of this distinction is obvious at once. Domestic animals are kept for the pleasure and profit and the comfort and convenience of mankind. Their natures are not ferocious; on the contrary ferocity is the exception to their general habits and disposition, which are generally kind and confiding, and not uncommonly even affectionate, obedient and patient.

“The ox toils through the furrow  
Obedient to the goad;  
The patient ass, up flinty paths,  
Plods with his weary load.  
With whine and bound the spaniel  
His master's whistle hears;  
And the sheep yields her patiently  
To the loud clashing shears.”

As therefore the owners of these animals have no reason to apprehend that they will act in any way contrary to their domestic habits, and the docility and kindness of their disposition, he is under no obligation to confine them or take any measures to prevent them from doing injury to mankind, until he has notice or knowledge that they have developed some vicious propensity. Until then there is no principle of reason or justice upon which the owner can be made liable. He does no wrong himself, and he has no reason to apprehend that any wrong or injury will be done by his animal. But after he has notice or knowledge that his domestic animal has

developed and disclosed a vicious or ferocious disposition to injure mankind or other domestic animals, then it is his duty, if he continues to keep the animal, to secure it in such a way as to render it incapable of mischief. Such animal is then placed by the law on the same footing with a ferocious wild beast, so far as proving the *scienter* is concerned in an action for an injury which it perpetrates, and he must, at his own peril, keep it safe, for if it escape and do an injury the owner is liable, no matter what diligence he may have used to confine it. The negligence consists in keeping the animal after notice.

The knowledge which has been spoken of need not be an actual personal notice to the owner, but the knowledge of his servant or his wife may be sufficient to charge the owner with knowledge; and in one case it was held that a dog may be brought into court for the inspection of the jury on the question of disposition.

It is upon the same principle of law, that the owner is made liable for a trespass committed on land by his domestic animals. It is known to be the nature and disposition of such animals to roam, and it is therefore the duty of their owner to restrain them, and if he fails to do so he is liable for the trespass, even though he did not know that they had ever trespassed before.

The rules of law which have now been stated have become elementary and have been laid down and enforced in some very remarkable and pointed cases, both in this country and in England. The dogs have done more mischief than any other domestic animals and their cases have been oftener before the courts, and some judges have been inclined to the opinion that if a person chooses to keep a dog which is savage and dangerous, he does so at his peril and is liable for any injury he may do without any proof of *scienter*. There is great reason for holding this to be the rule, for in such a case the dog is in the class of animals that are of a ferocious nature and disposition, and ought to be looked upon the same as a lion, a tiger or a bear. It is not necessary, however, to go so far as that in this case for the testimony was ample to show that the owner of the dog had full notice of his vicious propensity. The person who sold the dog to the defendants' superintendent testified that he told him this was an awful bad dog, that he bit everybody and everybody knew he was bad. This knowledge, together with the knowl-

edge that the dog bit the superintendent, must be imputed to the defendants; and as this testimony was uncontradicted it fully established the *scienter*. It is true this is ordinarily a question of fact for the jury, but when the fact is fully established by testimony which is not contradicted it ceases to be a question of fact for the jury and becomes a question of law for the court. The same may be said about the injury. The testimony was uncontradicted that the dog did the mischief and that he belongs to the defendants. The entire testimony, then, upon which the recovery depended was uncontradicted, and left nothing to be done but for the court to determine whether the plaintiff was entitled by law to recover. This being so we think the court did right, under the rules which have been before stated, in determining that the plaintiff was entitled to recover, and that there was nothing for the jury but the question of damages.

A remaining question is, whether there was any thing in the relation which the parties occupied toward each which prevented a recovery? The dog was kept by the defendants in their factory yard as a watch dog, and it was proved that he was let loose at night and that it was the duty of the engineer to chain him up in the morning. The plaintiff was, at the time of the injury, in the employ of the defendants and the defendants now insist that, inasmuch as it was through the neglect of duty on the part of the engineer that the dog was loose and injured the plaintiff, the defendants are not liable within the cases which hold that the master is not liable for injuries to his servant, which result from the negligence of a co-servant. We have seen above that after the defendants had knowledge of the vicious propensities of this dog, it was their duty to keep him secure at their peril. Their liability after that did not rest upon any question of diligence or of negligence in keeping the dog secure. The negligence consisted in keeping him at all. If he got loose and did mischief after knowledge, they were liable on proof of the injury and of knowledge. Therefore, whether or not the engineer was negligent in not chaining up the dog was entirely unimportant. He was not secured and he committed the injury, and no proof of negligence was necessary. That question was not in the case at all.

It was also claimed that, inasmuch as the plaintiff knew that the



dog was ferocious, he took the risk of injury by him by continuing in the defendants' employ. In the law, the right of a person to keep a watch dog to guard his property is placed upon the same ground as the right to set a spring gun for the same purpose, and both these devices may be justified for the purpose of preventing a felony. But there is no rule or principle of law that will justify either of these devices, so far as a servant is concerned, in the legitimate discharge of his daily duties. The defendants had no right to submit the plaintiff to the danger of attack from the dog, and there was no implied obligation, on the part of the plaintiff, to take any such risk.

The foregoing views lead to an affirmance of the judgment.

Judgment affirmed, with costs.

Present — BARNARD, P. J., and DYKMAN, J. GILBERT, J., not sitting.

Judgment affirmed, with costs.

# IN THE MATTER OF ISAAC M. MARSH AND OTHERS.

*Drainage of marsh lands — chap. 888, of 1869 — application for appointment of commissioners to appraise damages — Petition — contents of.*

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Chapter 888 of 1869, in relation to the draining of certain swamp lands in the town of Southfield, provided that if the commissioners appointed thereunder, could not agree with any person as to the compensation for lands taken for making and maintaining ditches, they "should proceed to acquire title to the easement upon and across the lands of such person in the manner, so far as the same is applicable, prescribed by the general railroad law of 1850." *Held*, that the commissioners were not required to set forth in the petition, presented to the court for the appointment of commissioners to appraise damages, the existence of all the facts which were required by the statute to authorize their appointment, but that it rested upon the parties objecting thereto to allege and establish the non-existence of such facts.

*Matter of the N. Y. C. and H. R. R. Co.* (5 Hun, 86) followed.

APPEAL from an order appointing commissioners to appraise damages for the taking of certain lands under chapter 888, of 1869,

HUN — VOL. X. 7

providing for the draining of certain swamp lands, in the town of Southfield and county of Richmond.

*Winsor & Marsh*, for the appellant.

*G. J. Greenfield*, for the respondents.

DYKMAN, J.:

Under and in pursuance of the provisions of chapter 888 of the Laws of 1869, Isaac M. Marsh, Richard Christopher and George M. Root were appointed commissioners to drain the lands within a certain district in the town of Southfield, in the county of Richmond. This law provided that if the commissioners could not agree with any person upon the compensation and damage for the lands taken, for making and maintaining forever the necessary ditches and channels, they should proceed to acquire title to the easement upon and across the land of such person in the manner, so far as the same is applicable, prescribed by the general railroad law of 1850, and the acts amending the same, and for the purpose of acquiring such easement, under the statute, the commissioners were given the powers granted to railroad corporations under the railroad law, so far as was necessary to acquire title to the easement, and no further.

Under this provision the commissioners presented a petition to the Supreme Court at Special Term, dated June 10th, 1875, in which they stated that in the prosecution of the work of drainage it had become necessary to lay drains and channels for the passage of water over and upon the lands of various persons, and to obtain the easement for working such drains and channels over these lands, and that, among others, it had become necessary to obtain such easement over and upon the several lots and premises described in the petition, and that the commissioners had been unable to agree with the owners of the lands upon the compensation and damages for making and maintaining such drains and channels. The petition then set out a particular description of the lands and premises upon which the easements were sought to be acquired, and prayed for the appointment of three commissioners to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate, upon and across which the said drains or channels were to be laid.

After a delay of more than one year the court made an order upon this petition, appointing three disinterested and competent freeholders residing in the county of Richmond commissioners, in pursuance of the prayer thereof, to ascertain and appraise the compensation which ought to be made to the owners and persons interested in the lands mentioned and described in the petition. This appeal is from that order, and is brought and presented, on the ground that the petition does not set out the proceedings of the drainage commissioners previous to the presentation of the petition. The position of the appellants seems to be that the petition must allege the performance of every act or thing, necessary to be done by the commissioners under the law; that all these must be alleged as traversable facts, and must be proved as alleged.

We agree fully that every thing required to be done by these statutes, must be done strictly in accordance with their requirements. The right of eminent domain is a high prerogative right, to be exercised only by the sovereign power, either by a direct act or by the delegation of its power, and, when the power is delegated, it must plainly appear, and nothing must be taken by implication. When the legislature provides that a private individual may be divested of his title to his property for public purposes in a particular way, the particular requirements must all be complied with, and the particular steps necessary must all be taken. Admitting all this, however, we do not see how the appellants are to derive any benefit from these rules. It is very true that many things are required by the statute to be done, before these commissioners can make an application to the court for the appointment of commissioners, to determine the compensation to be paid to the land-owners; but there is no requirement that all these things shall be stated in the petition for their appointment. So, many things are required to be done by a railroad company, before any application can be made to the courts for the appointment of commissioners to appraise the damages for the lands proposed to be taken. The petition is simply the foundation of the jurisdiction of the court to appoint the appraisers, and notice is required to be given of the time and place of its presentation to all persons whose estates or interests are to be affected by the proceedings, to the end that they may come in and show cause against granting the prayer of the

petition, and disprove any of the facts alleged in it; they are not confined to disproving the facts alleged in the petition, but may show any cause against granting the prayer. If no cause is shown, then the prayer is granted, of course, not because the petition sets out every thing that has been done, but because no one shows any cause against granting the prayer, and the court assumes that there is none. The statute throws the burden of proof upon the objector; cause must be shown against granting the prayer. (*Matter of New York Central and Hudson River Railroad Company*, 5 Hun, 86.)

In this case, no cause was shown at all. The petition was presented, with proof of service, on all persons interested. No cause was shown, and the prayer of the petition was granted. The court could do nothing less. The land-owners might have appeared at the presentation of the petition and shown any failure to comply with the requirements of the law, either in respect to the matters stated in the petition or otherwise, and then the court would have refused to make the appointment until the law had been fulfilled. Not having done so, this appeal presents nothing to be corrected by this court, and the order appealed from must be affirmed, with costs and disbursements.

BARNARD, P. J., concurred. GILBERT, J., not sitting.

Order affirmed, with costs and disbursements.

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ALEXANDER TAYLOR, AS EXECUTOR, ETC., RESPONDENT, v.  
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY,  
APPELLANT.

*Life insurance—written application for—when company cannot take advantage of mistakes in.*

The plaintiff's testator having applied to an agent of the defendant for an insurance upon his life, the agent applied to the medical examiner of the company for information respecting the applicant, and was informed by him that he was the physician of the applicant and knew of all the sickness he ever had; that he knew the man and his family record well; that it was unnecessary to wait to fill out a written examination. The physician had previously stated to

the applicant that he had no disease which would stand in the way of his application. The same evening the agent, applicant and physician met together, when the latter again stated that the applicant was a sound man. Subsequently, and after the risk was accepted, the written application was filled out by the agent and signed by the applicant.

In an action to recover on the policy so issued, the company defended, on the ground that the application stated that the applicant had had no ailment or disease within the last ten years, and that he had no medical attendant; while, in fact, he had a medical attendant, and had been sick for a couple of weeks, some years before, from a disease of the stomach. *Held*, that the making out of the application must be regarded as the act of the company, and it could derive no benefit or immunity from any misstatement therein contained.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial, made at the Special Term upon a case and exceptions.

*John T. Pingree*, for the appellant.

*C. H. Winfield*, for the respondent.

DYKMAN, J.:

This is an action upon a policy of life insurance, and is defended on the ground of misstatements and concealments made in the application for the insurance. The insurance seems to have been effected in the following manner: The assured resided at Middletown, Orange county, at which place the defendant had a local agent and a medical examiner, and on the 20th day of December, 1871, there was a general traveling agent of the defendant there also. The former on that day made application to the agent of the company for insurance, and the agent applied to the medical examiner for information respecting the applicant and was told by him that he was the physician of the applicant, and knew of all the sickness he ever had, and knew the man well, and knew his family record, and that it was unnecessary to wait to fill out a written application, and that he would make the medical examination. A few hours previous the medical examiner told the assured in a conversation with him on the subject that he had no disease which would stand in the way of his application. On the evening of the same day the assured, with other applicants, met the medical examiner and the agent to be examined, with three others. The agent

was in great haste to leave, and the examiner told him that the assured and the other three were all sound men. After this the written application was made out which was signed by the assured, and which contains the statements relied upon to defeat a recovery in this action, which statements are, in substance, that the assured had no ailments or diseases within the last ten years, and that he had no medical attendant.

From this statement it will be seen that this written application did not induce the acceptance of the risk, but that the medical examination was had, full investigation made by the agent and the risk accepted, before this written application was made. The risk was really accepted upon the information derived from the medical examiner, who knew all about the applicant and who gave full information to the agent. Instead of inducing the agent to accept the risk the applicant was really induced to take the policy. He placed himself completely in the hands of the medical examiner, before he made the application or submitted to the medical examination, and was told that there was no obstacle in the way of his taking a policy. The agent was told the same thing in substance, and then the applicant submitted to the examination and received his policy and paid the necessary premium.

Now, if under these circumstances this company can escape liability on this policy, then life insurance will be reduced to a delusion and a snare. The companies send their agents into all places to preach the gospel of life insurance to all men, and to induce them to become insured. They meet with men of all classes, many of them having little or no education, and understanding but very little of the force or effect of language or words. They draw all the papers themselves, fill up blank applications and policies, with which they are familiar and the applicant is not, and the applicant appends his name, in most instances, in blind reliance upon the assurance of the company's agent that all is right, and all will be well. This is substantially a true picture of this case. Now, it is claimed that a false statement has been made which vitiates the whole contract; that, whereas, the application contains a statement that the applicant had had no ailments or diseases within the last ten years, yet in truth and in fact within that time he had had an attack of one of the most common forms of inflam-

mation of the stomach, which lasted about two weeks, and which might have been forgotten at the time of making this application. Of course this attack had no possible connection with the disease which eventually caused the death of the insured person. There can be no pretense that any fraud or misrepresentation was intended by the applicant, and, as he was free from fraud, we intend to sustain this judgment on the ground that the making out of the application must be regarded as the act of the company, and it can derive no benefit or immunity from any misstatement it contains. In the case of *Rowley v. The Empire Insurance Company* the Court of Appeals held that an agent of an insurance company, in filling up a blank application for insurance, acts as the agent of the company rather than of the applicant, and a misstatement made therein by him, which is not induced by the instruction of the appellant, does not avoid the policy. (4 Ct. App. Dec., 131; 36 N. Y., 550.) The same doctrine had been before that held in the case of *Plumb v. The Cattaraugus County Mutual Insurance Company* (reported in 18 N. Y., 392), and when Judge GROVER questioned the correctness of this decision in his opinion in the case of *Owens v. Holland Purchase Insurance Company* (56 N. Y., 565), all the other judges took pains to say they did not concur in that portion of the opinion. The case of *Flynn v. The Equitable Life Insurance Society* is much like this case, and the court sustained the recovery on the ground that, although the answers and statements were untrue, yet, as the medical examiner, under whose advice they were made, was the agent of the company, they were bound by his acts, and could not set up the untruthfulness of the answers and statements as a defense. (7 Hun, 387.)

This doctrine accords with good sense, fair dealing and sound morals, and ought to prevail.

Judgment affirmed, with costs.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment and order denying new trial affirmed, with costs.

THE BREWERS' FIRE INSURANCE COMPANY, RESPOND-  
ENT, v. JOSEPH BURGER, APPELLANT.

*Conditional subscription — Contract — reducing of part to writing — does not preclude oral evidence of the residue — Conditional delivery.*

This action was brought to recover sixty per cent of a subscription, made by the defendant to the capital stock of the plaintiff. The defendant insisted that the entire agreement was not contained in the subscription paper, and that the subscription was void because delivered under an agreement that it was not to become valid or binding unless \$200,000 should be subscribed, and unless a branch office of the company were established in New York, neither of which conditions had been complied with; the defendant objected to signing the paper when presented to him because the said conditions were not therein stated, but was informed by plaintiff's agent that it would not be valid until they had been complied with; *held*, that the defendant should be allowed to prove that the paper was signed upon said conditions, and that if he succeeded in so doing he was entitled to a judgment in his favor.

APPEAL from a judgment in favor of the plaintiff, entered upon a verdict directed by the court.

*John H. Bergen*, for the appellant.

*Edward Solomon*, for the respondent.

DYKMAN, J.:

This is an action to recover sixty per cent upon a subscription to the capital stock of the company to which the plaintiff has succeeded. His defense is that the subscription paper never was delivered to the plaintiff, and that it never became a valid or binding or subsisting contract, and was only to become such if \$200,000 was raised by subscription, and a branch of the company established in New York city, and that these were conditions precedent to the liability of the defendant. On the trial of the cause there was testimony introduced which tended to establish the defense. It was shown that, at the first meeting in relation to the matters in New York city, it was agreed that an effort should be made to raise \$200,000 of stock, of which twenty-five per cent in cash should be paid, and



if that amount could not be raised it should be considered an experiment, and the signatures should be null and void. That if the amount of \$200,000 should be subscribed, then a meeting was to be called to organize a department of the east. That the subscription was to be for the basis of the western company. That unless the \$200,000 was subscribed it was considered an experiment, and there should be no further action taken in the premises. That if the \$200,000 was subscribed a meeting was to be called, and the department of the east organized, and the basis of the department of the east was to be the appointment of a committee of finance to collect the money and have it in their trust; that the money this committee of finance was to collect, was the twenty-five per cent on the \$200,000 subscribed, and that this sum of \$200,000 was to be the capital of the department of the east. This arrangement was made at the meeting at Schaeffer's. This testimony was given on the part of the plaintiff, and is entirely uncontradicted.

Mr. Jacobs, the agent of the plaintiff, drew up a subscription after this meeting, and it was presented to the defendant by Mr. Katzenmeyer for Mr. Jacobs. The defendant at once objected to the paper, because there was nothing in it about the department of the east, or that the money should remain here in their own treasury; that there was nothing said in the paper about the \$200,000. Katzenmeyer told him it would all be right, and that the arrangement made at Schaeffer's would be carried out, and on that condition the defendant signed it. These facts are also undisputed.

The trial court must have proceeded upon the theory that the defendant was bound by the paper writing which he signed, and could not be permitted to contradict it for the purpose of defeating a recovery. This was a mistake. The case presented was one where the original contract was verbal and complete, and a part only of it was afterward reduced to writing, and in such cases it is always competent to prove the whole agreement. (Greenl. Ev., § 284.) The subscription paper which was signed by the defendant was only one of two transactions between these parties in relation to the same subject, and the defendant had a right to show what the other transaction was, because his legal obligations, whatever they were, arose out of both. This is no violation of the salutary rule of law which forbids the use of parol testimony to affect a written

instrument, because a part only of the agreement is reduced to writing. If the defendant had assented to the terms of the subscription paper, there might be some ground for saying he waived the agreement which was made at Schaeffer's, but, so far from his doing so, he objected to the paper because it did not contain that agreement, and only signed it when he was assured that agreement should stand and be carried out.

In the case of *Bostwick v. The Baltimore and Ohio Railroad Company* (45 N. Y., 712), certain goods were shipped under a verbal agreement for their transportation, and in a few days a bill of lading was sent for the goods, which, by its terms, limited the liability of the carrier, and contained a statement that, by accepting it, the shipper agreed to its conditions. The bill was not returned, and yet it was held that the verbal agreement was not merged in it, and the shipper was not concluded from showing what the actual agreement was.

Within this principle the defendant had the right to invoke to his aid the verbal agreement made at Schaeffer's, and to rely upon the safeguards which were thrown around him by its provision. Of these he was wholly deprived on the trial, and made to stand upon a paper which contained a small part of the agreement, which he had actually made, which he had signed under protest and delivered on condition. The court thus placed the defendant in a position where no voluntary act of his legitimately consigned him, and the result to him could hardly be otherwise than disastrous.

Again, it was entirely competent for the defendant to annex any condition to the delivery of this subscription paper, and to limit the extent of its operation by the conditions upon which the delivery was made. He did annex to the delivery the condition that he should and would be liable if the arrangement made at Schaeffer's was carried out, and in no other event. The delivery, then, was upon the condition that \$200,000 should be subscribed, that a meeting should then be called, and the department of the east organized, and a committee of finance appointed to collect twenty-five per cent of the subscription. This, then, was the legal obligation which was assumed by the defendant when he signed the subscription, and as all the conditions were precedent to his liability, their performance must all be shown before his liability attaches. The defendant asked to have

all these questions submitted to the jury, and the court denied the request, and ordered a verdict for the plaintiff for the full amount of the claim. We think the very least that the court could have done for the defendant was to allow him to go to the jury, and that the refusal to do so was error, for which the judgment must be reversed, and new trial granted, costs to abide event.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment reversed, and new trial ordered, costs to abide event.

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THE CONNECTICUT FIRE INSURANCE COMPANY,  
APPELLANT, v. THE ERIE RAILWAY COMPANY,  
RESPONDENT.

*Insurance — loss to property — release by owner to party causing — effect of, on rights of insurance company paying the loss.*

Certain buildings belonging to one Martin having been burned through the negligence of the defendant, a settlement was effected by which, in consideration of a certain sum of money paid to Martin, he discharged the company from all his loss and damages occasioned by the fire. Subsequently, he brought an action against the plaintiff upon a policy of insurance issued by it, and recovered judgment therein, upon payment of which he assigned to the plaintiff any claim against the defendant which might still remain in him after the said settlement. In an action by the plaintiff to recover the amount paid upon the policy of insurance; *held*, that as Martin had discharged all his claim against the defendant, he had no right of action against it which he could assign to the plaintiff, or to which it could be subrogated upon paying the amount of the policy.

APPEAL from an order made at Special Term, setting aside a verdict of the jury in favor of the plaintiff, and dismissing the complaint herein, and from the judgment entered in pursuance of the said order.

*Scott & Hirschberg*, for the appellant.

*Lewis E. Carr*, for the respondent.

DYKMAN, J.:

John Martin was the owner of certain buildings and premises in Orange county in the year 1872, and on the twentieth day of December in that year he procured them to be insured against fire by the plaintiff for the sum of \$1,500. The property adjoined the railroad of the defendant, and on the 13th day of May, 1873, the buildings were destroyed by a fire which had its origin in sparks which were emitted from one of the locomotive engines running on the defendant's road. On the 10th day of September, 1873, Martin effected a settlement with the defendant for the damages he claimed to have sustained by reason of negligence in setting fire to and destroying his buildings, and received from the defendant the sum of \$2,100 in money, and gave a full receipt and discharge to the company for all his loss and damage by the fire which destroyed his buildings.

In August, 1873, an action was commenced by Martin against the plaintiff to recover the amount of his insurance, which resulted in a judgment in favor of the plaintiff for the full amount of the claim. This judgment was paid by the plaintiff on the 11th day of February, 1874, and on that day Martin executed and delivered to the plaintiff an assignment which contained this clause: "The said John Martin hereby sells, assigns, transfers and sets over to the said insurance company all claim, demand and right of action against the said Erie Railway Company arising out of the fire aforesaid, which he now has or which may have remained to him after the settlement of the claim made by him against said Erie Railway Company as aforesaid." Now, this action is brought to recover the sum of \$1,500, the amount of the insurance paid by the plaintiff. The case was tried at the Circuit, where a verdict was rendered for the plaintiff, which was set aside by the court on the minutes, and the case now comes to us on appeal from that order.

The right of the plaintiff to recover in this action is vested on the principle of equitable subrogation, a doctrine which had its origin and much of its growth in the Roman civil law, under the name of substitution; and it is one of the many illustrations of the enlightened policy of that people, that a doctrine so much in accordance with the principle of natural justice should have early found a place in that splendid system of Roman law. It has been transplanted

from the civil law into our system of equity jurisprudence, and is very useful in bringing about just results in a great variety of cases. Concisely stated, it means that where one person discharges an obligation which primarily rests upon another, he shall be substituted to the place of a creditor in respect to the party who is primarily liable, and shall have the benefit of all securities or claims which are held by the creditor. The doctrine may be applied to cases of insurance as well as any others, as the chancellor said in the case of *The Etna Fire Insurance v. Tyler* (reported in the 16th of Wendell, 397). This principle of equitable subrogation, or substitution of the underwriters in the place of the assured, is recognized by every writer on the subject of insurance, and is constantly acted upon in courts of law as well as in equity; so that where the assured has any claim to indemnity for his loss against a third person who is primarily liable for the same, if the assured discharges such third person from his liability before the payment of the loss by the underwriters, he discharges his claim against them for such loss *pro tanto*; or, if he obtain payment from such third person afterwards, it is in the nature of salvage, which he holds as trustee for the underwriters who had paid the loss. So, in the case of *Gracie v. The New York Insurance Company* (8 Johns. R., 246), where there was a recovery by the assured for the full amount of the policy, upon the condemnation of a vessel and cargo under the Berlin and Milan decrees, Chief Justice KENT said that if the French government should at any time make compensation for the capture and condemnation, the United States would receive and hold the money as the trustee of the underwriters, who would clearly be entitled to be paid the same.

If this case is to be determined in accordance with the principles enunciated in the foregoing extracts, then there is very little trouble in reaching a satisfactory conclusion. At the time Martin made his assignment to the plaintiff he had settled with the defendant; had been paid the full amount of his damages, and had given a full discharge of all claim against the company; he therefore had no claim against the defendant at that time, in relation to which the plaintiff could be substituted and put in his place. The doctrine of subrogation can have no application where there is no person who is primarily liable to discharge the claim which is paid and discharged by the party seeking to be subrogated. Here the defendant, the

party primarily liable to pay for the loss, had done so — had discharged the obligation. Certainly there was no further claim of Martin against it, and there was, therefore, no claim of his to which the plaintiff could be substituted. The plaintiff cannot get through him what he cannot get himself. This seems to go to the very foundation of the plaintiff's claim, and must defeat a recovery.

After the destruction of the buildings Martin had two remedies for the recovery of his loss : one against the defendant, given to him by law, and one against the plaintiff by virtue of his contract of insurance. He had the right to pursue whichever of these remedies he chose in the first instance. If he had applied to plaintiff and been paid the amount of his policy, he might still have brought an action against the defendant, for the recovery of his damages resulting from the negligence which caused the fire, and in such an action his recovery would not have been diminished by any amount received from the insurance company. (*Merrick v. Brainard*, 38 Barb., 589 ; 34 N. Y., 208.)

We are not now called upon to determine what rights the plaintiff would have acquired by such payment to Martin. As the liability of the defendant to Martin was primary, it may be that the plaintiff, in that event, might have had a right of substitution ; or, in an action against the plaintiff by Martin to recover this insurance, after having been paid by the defendant, he might have been limited in his recovery to an amount that would make good his loss. But we have no such case. Instead of applying to the plaintiff he applied to the defendant, and was paid a sum of money in full discharge of its liability. No fraud or collusion is alleged, and he had no further claim against the defendant, and it follows that the plaintiff had none.

The judgment must be affirmed, with costs.

Present — GILBERT and DYKMAN, JJ. BARNARD, P. J., not sitting.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
WILLIAM J. UNDERHILL, UNDER SHERIFF OF THE COUNTY  
OF ORANGE, RESPONDENT, v. STEPHEN W. FULLERTON,  
COUNTY JUDGE OF ORANGE COUNTY, APPELLANT.

*Judgments of courts-martial—review of.*

The legality of a judgment of a court-martial, where such court had jurisdiction and power to render the same, cannot be reviewed upon a *habeas corpus*, issued to procure the discharge of one committed to the county jail by virtue of an execution issued thereon.

APPEAL from an order made at Special Term, reversing on *certiorari* an order of the county judge of Orange county, discharging one John O'Brien from the custody of the relator upon a *habeas corpus* issued by the said judge.

*M. H. Hirschberg*, for the appellant.

*E. A. Brewster*, for the respondent.

DYKMAN, J.:

John O'Brien was a member of the nineteenth battalion of the New York State National Guard, and on the 17th day of September, 1875, the colonel issued an order requiring the battalion to assemble at the armory in the city of Newburgh, on the fifth day of October, at ten o'clock in the forenoon, for the purpose of drill, discipline, muster and inspection, and instruction in camp duties and rifle practice, and to proceed by train to near Washingtonville, and there remain in camp until the evening of October seventh, each man to provide himself with rations for the time he would be in camp, and also with necessary bedding, and at least one pair of white gloves. O'Brien disobeyed this order. He was summoned before a battalion court-martial, tried, found guilty, and sentenced to pay a fine of nine dollars. The warrant was issued for the collection of the fine or the imprisonment of the defendant, and in default of payment the defendant was arrested and lodged in the Orange county jail. Thereupon a writ of *habeas corpus* was sued out before the Hon. STEPHEN W. FULLERTON, the county judge of Orange county, who, after a final hearing, ordered the defendant

O'Brien to be discharged. The proceedings before the county judge were then brought into this court by *certiorari*, and the order made by the county judge was reversed by the order of a Special Term, and the case comes now to the General Term on appeal from that order.

There is no complaint of any irregularity in the proceedings of the court-martial, nor that the court was not properly constituted. This being so, the court had jurisdiction of the person of O'Brien, because he was a member of the battalion, and of the offense, because it was a military offense of disobedience of orders, and the fine was not in excess of what the law permits.

Under this state of facts we are met at the threshold of the case with the question, whether the legality of the order of the colonel which was disobeyed by O'Brien can be reviewed on proceedings by *habeas corpus*, or whether that must be done by appeal?

The jurisdiction of courts-martial is limited, but they are courts, nevertheless, within the meaning of the Constitution, and so long as they act within the scope of their powers, their proceedings and judgments are as valid and effectual as those of any other tribunal. They are instituted for the trial of offenses against the military law, committed by persons who are amenable to its mandates, but have no power or authority over other members of the body politic. By the act of enlistment into the military service, a person submits himself to all the requirements, rules or regulations of the military law, and among these is the authority to try such enlisted persons for all breaches of military duty. The breach with which O'Brien was charged in this case was absence from parade and encampment. In his defense he pleaded that the order of the colonel, which he disobeyed, was one which that officer had no authority to make. The court found against him on that question, and found him guilty of the offense charged, and imposed upon him the penalty prescribed by the Military Code of the State in such cases.

We thus have two propositions clearly established: First, that the court-martial had power to try O'Brien for the offense with which he was charged, and was entirely competent to inflict the punishment which was imposed upon him. In other words, the judgment was one which the court had jurisdiction and power to render. Now, suppose the court fell into an error in deciding the legal ques-



tion raised against O'Brien, can that error be corrected by *habeas corpus*?

The twenty-second section of our *habeas corpus* act provides that persons committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree, shall not be entitled to prosecute such a writ, and the forty-second section provides that no court or officer, on the return of any *habeas corpus* or *certiorari* issued under this article, shall have power to inquire into the legality or justice of any process, judgment, decree or execution specified in the preceding twenty-second section, that is, the judgment or decree of any competent tribunal of civil or criminal jurisdiction. Now, these provisions make it plain that we cannot make the writ of *habeas corpus* perform all the functions of a writ of error or of an appeal, and that the most that can be done, under it, is to determine whether the process or judgment complained of emanated from a court of competent jurisdiction, and whether the court had the legal and constitutional power to render such judgment or to issue such process. We cannot, under the writ, review the decision nor judgment nor process of a court of competent jurisdiction. There is nothing in Tweed's case, in the Court of Appeals, in conflict with this doctrine. The court there held that the court below had rendered a judgment beyond its competency; that the power of the court was exhausted by one sentence upon the prisoner, and that the other sentences were void, because the court had no power to impose them under any circumstances. All the court did in that case was to inquire into the legal and constitutional power of the court to do what was done, and it very expressly stated in that case that, if the judgment was erroneous merely, the court having given a wrong judgment when it had jurisdiction, relief can only be had by writ of error or other process of review.

We think these considerations show that the order of the Special Term must be affirmed, with costs and disbursements.

Present—BARNARD, P. J., and DYKMAN J. GILBERT, J., not sitting.

Order affirmed, with costs and disbursements.

HUN—VOL. X. 9

CHRISTOPHER MEYER, RESPONDENT, v. FRANCIS S. LATHROP, AS ASSIGNEE IN BANKRUPTCY OF JAMES A. WILLIAMSON, IMPEADED, ETC., APPELLANT.

*Principal and surety—relation between grantor, and grantee assuming payment of mortgage—extension of time of payment.*

Although when a grantee of property assumes the payment of a mortgage then existing thereon, he becomes, in equity, as between himself and the grantor, the principal debtor, and the grantor is regarded as a surety; yet, the rights of the mortgagee are not affected thereby, and, as to him, the mortgagor still continues to be the principal debtor, and the liability of the latter to him is not affected by an extension of the time of payment of the mortgage given to the grantee.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

*William G. Wilson*, for the appellant Lathrop.

*W. H. Williams*, for the respondent.

DYKMAN, J.:

This action is brought to foreclose four mortgages of \$3,000 each, made by the defendant Fickelt to one Herbert, and assigned first to Beckwith and then to the plaintiff. The premises covered by the mortgages were conveyed by Fickelt to James A. Williamson, who assumed the payment of the mortgages on the 19th day of June, 1874, when Williamson was the owner of the premises and the plaintiff was the holder of the mortgages. Williamson made his twelve several promissory notes for upwards of \$1,000 each, payable to his own order one every month, and indorsed by him in blank, and delivered them to the plaintiff, who accepted them and at the same time signed and delivered to Williamson the following instrument:

“NEW YORK, *June 19*, 1874.

“Received from James A. Williamson his twelve promissory notes as per memorandum above, being in full for principal and interest of four bonds and mortgages made by H. E. Fickelt on four houses and lots on Myrtle avenue, Brooklyn, which bonds and mortgages I hereby agree to assign to such parties as he may designate when called for.

“C. MEYER.”

The first three of these twelve notes were paid, and the plaintiff offered to surrender the remaining nine on the trial. Before the commencement of this action Williamson was adjudged a bankrupt, and the defendant Lathrop was appointed his assignee in bankruptcy.

This action is defended on the ground that the acceptance of the promissory notes and the giving of this instrument by the plaintiff was a payment of the mortgage, and Fickelt sets up the defense that he was released, by the extension of the time of payment of this mortgage by the plaintiff without his assent. Neither of these defenses are valid. There is no proof nor pretense that there was any agreement to accept the promissory notes in payment of the mortgages, and if any thing is settled in our law it is that the acceptance of the promissory note of the debtor does not extinguish the original demand for which it is taken. (*Waydell v. Luer*, 5 Hill, 448; *Hill v. Beebe*, 13 N. Y., 562.) This principle of law is therefore entirely fatal to this defense, so far as Williamson is concerned.

So far as the defense set up by Fickelt goes, it comes to this: The effect of the acceptance of the promissory notes by the plaintiff was to extend the time for paying the mortgages. In equity as between themselves, Williamson became the principal debtor when he assumed the payment of the mortgages, and Fickelt occupied the position of surety in relation thereto. Now it is claimed that the extension of the time for Williamson by the plaintiff, without the consent of Fickelt, operated as his discharge, and this claim is founded upon the general principle of law, that if time is given to the principal the surety is discharged. This principle is founded upon, or rather results from the equitable right of the surety to be subrogated to the rights of the principal at any time. This is all well enough as a general proposition, and without deviating now to speak of its limitations, it is sufficient to say here that it has no application to this case, for the reason that Fickelt is not a surety upon these bonds and mortgages, but is the original maker, and is only considered as such in equity for the purpose of working out certain equitable results; as between Williamson and himself it is equitable that the mortgages should be paid out of the land and by the owner, who should be treated as the debtor, primarily liable to pay the debt. This equitable rule does not, however, interfere with

any of the legal rights of the plaintiff; as to him Fickelt is still liable upon his bond and mortgage as principal debtor, and an action can be maintained against him by the plaintiff as such. This shows that Fickelt cannot, in this case, invoke the rule of law mentioned to shield him from liability to the plaintiff in this action.

The judgment must be affirmed, with costs.

BARNARD, P. J., concurred. GILBERT, J., not sitting.

Judgment affirmed, with costs.

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WILLIAM M. SCOTT, RESPONDENT, v. JAMES H. ELMORE,  
JR., AN INFANT, APPELLANT, IMPEADED WITH OTHERS.

*Supplementary proceedings—order appointing receiver in—title to real estate, not passed by recording of.*

On November 27, 1874, a judgment was recovered against the defendant Elmore, who was in possession of and entitled to a life estate in certain real property. Execution having been issued upon said judgment and returned unsatisfied, supplementary proceedings were instituted, in which, on June 25, 1875, a receiver of the property of the said Elmore was duly appointed by an order which was duly recorded. July 1, 1875, the receiver conveyed all the right, title and interest of Elmore in the said real estate to the plaintiff. Elmore never made any conveyance to the receiver, nor was any order ever made by the court requiring him so to do, or directing a sale by the receiver.

*Held*, that the receiver was not vested, by virtue of his appointment, with any title to the real estate owned by the judgment debtor, nor did the plaintiff acquire any interest therein by virtue of the conveyance from him.

*Bank v. Rixley* (19 N. Y., 375) and *Moak v. Coats* (33 Barb., 498) followed.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

The action was for partition of real property, the plaintiff claiming an interest therein, under a deed executed by a receiver, in proceedings supplementary to execution, of a judgment debtor having a life estate in said property.

The order appointing the receiver was duly recorded in the proper clerk's office.

*Robert S. Green*, for the guardian *ad litem*, appellant.

*Edward S. Clinch*, for the respondent.

DYKMAN, J.:

The object of this action is to procure the partition or sale of certain real property in the county of Queens. The original source of title to the premises was Annette C. Elmore. She died seized in fee of the premises, and intestate, in October, 1872, leaving her surviving, her husband James H. Elmore, and two children Charles Elmore and James H. Elmore, Jr. Charles has since died intestate and without issue. On the 21st day of January, 1875, William Bunting was appointed the receiver of the property of James H. Elmore, in proceeding supplementary to execution, by the county judge of Queens county, and on the 1st day of July, 1875, he made, executed and delivered to the plaintiff a deed of conveyance of all the right, title and interest of James H. Elmore in the premises in question. James H. Elmore, the judgment debtor, never made any conveyance to the receiver. On the 3d day of August, 1875, the plaintiff, with his wife, made, executed and delivered to George Deerland a deed of conveyance for the equal, undivided one-half of the premises in question. It will thus be seen that at the death of Annette C. Elmore her husband became entitled to a life estate in the premises, or tenant by the curtesy, and that the remainder descended to her two sons; as Charles has since died his half of the remainder vests in his brother. The plaintiff, at the time of the commencement of this action, was in the possession of premises, and he claims that, by the deed of conveyance from the receiver, he became the owner of the life estate of James H. Elmore, and that, as he has conveyed the one-half of this estate to George Deerland, who is out of possession, he can now maintain this action for partition because he now holds his life estate in common with Deerland, who is made a party defendant.

It is first important to determine the legal effect of the deed of conveyance from the receiver to the plaintiff. On the 27th day of November, 1874, a judgment was docketed, in the county of Queens, for a large amount in favor of Aaron A. Degrauw against James H. Elmore, who was then residing on these premises, and of course

this judgment became a lien on his estate therein. An execution was issued on this judgment against the property of the defendant, and his life estate could have been sold under that execution ; but it was not, and the execution was returned unsatisfied ; and then the proceedings supplementary to execution were instituted, which resulted in the appointment of the receiver, as has been stated. There were three other judgments against James H. Elmore, which were liens on this same land to the same extent as that of the plaintiff, but they were all prior to his ; whether or not they have been satisfied the case does not disclose.

If the interest of James H. Elmore in this land had been sold under the execution on the plaintiff's judgment, the sale would not have become absolute until the expiration of fifteen months. The judgment debtor and her heir and grantees had twelve months in which to redeem, and then the other judgment creditors and mortgagees had three months longer, in which they might acquire the interest of the purchaser at such sale. Now, this right to redeem and take the situation of the purchaser at a sheriff's sale is a legal right which is given to a junior judgment debtor by our statute, and of which he cannot be deprived by any act, either of the debtor or of a prior judgment creditor.

If, instead of a sale of land under an execution against property, a judgment debtor can procure the appointment of a receiver in supplementary proceedings, and take from him a conveyance of the real estate of the judgment debtor, and thus vest himself with the absolute title, free from the right of redemption, then the whole of that nicely adjusted policy of our statute in relation to sale of real property to enforce the payment of judgments, is subverted and swept aside. Let it be borne in mind that there never has been any order of the court directing any conveyance or assignment from the judgment debtor to the receiver, nor directing any sale or conveyance by the receiver. Proceedings supplementary to execution are analogous to the commencement of an equitable action in the nature of the old-fashioned creditors' bill ; and its only object, so far as it relates to land, is to clear away some fraudulent obstruction to the ordinary and legal remedy by execution. It is true that the Court of Chancery had the power, and exercised it, to compel the debtor to make an assignment of his property to the receiver (*Chipman*

v. *Sabbator*, 7 Paige, 47); and when this was done the receiver became the trustee, and discharged his duties under the direction of the court. This remedy still exists. The Supreme Court has now the same power as the old Court of Chancery in this respect, and, where a creditor elects to pursue it, he may, but he cannot be compelled to do so. In this case the plaintiff has not pursued this remedy, and it is no part of the legitimate office of a creditor's suit. That office is performed when the obstruction to the legal remedy by execution is swept aside. In this case there was no such obstruction. The lien of the plaintiff's judgment had attached to the interest in the land, of his judgment debtor, and the title still remained in him. There was no office to be performed by the subsequent proceeding, unless the plaintiff went further and obtained an assignment from his judgment debtor to the receiver under and in pursuance of the order of the court. The judgment debtor was in possession of land in which he had a legal estate, and we do not think that a receiver ought to be appointed in such a case; and, if one is appointed, we do not think he takes an interest in the land of the judgment debtor, which empowers him to convey any title to it at all. To hold otherwise would be to decide substantially that the court can cut off the right of a junior judgment creditor to redeem, by the appointment of a receiver in any case, whereas, "if his judgment has been recorded before other creditors have instituted proceedings in equity, nothing in the course or in the result of those proceedings can affect his right." (*Bank v. Risley*, 19 N. Y., 375.)

It seems to be settled that, before the Code, a receiver took no title to real property by the mere order of the court, without any conveyance from the judgment debtor in whom the legal title was vested. (*Wilson v. Wilson*, 1 Barb. Ch., 592; *Porter v. Williams*, 5 Selden, 142.) Whether, under the provision of section 298 of the Code, a receiver takes title to real property by the mere order of the court appointing him, has been much discussed in several cases in the Court of Appeals, but the judges have differed in their views. In the case of *Porter v. Williams* (*supra*), Justice WILLARD expressed the opinion, that by the Code real and personal property are placed on the same footing in this respect, and that no assignment is necessary to vest the legal estate to either. This, however, is but the mere expression of his own opinion and is of no binding force, as

the question was not involved in the case. The most satisfactory case is that of the *Chautauqua County Bank v. Risley*, above quoted. In that case Judge COMSTOCK discussed the question respecting the power of the receiver to make a sale under a judgment of the court, that would cut off the right of the debtor to redeem, with great ability and great thoroughness, and came to the conclusion that he had no such power without an assignment from the judgment debtor, and in the course of the discussion he says: "The personal estate became vested in the receiver from the time and by virtue of his appointment, the real estate only by virtue of a conveyance to him, which the court has power to compel."

In *Moak v. Coats* (33 Barb., 498), proceedings supplementary to execution were instituted against Catharine Coats, and the plaintiff was appointed receiver therein, when she was the owner of a dower right as the widow of her husband, then deceased; after the plaintiff's appointment the widow joined with the heirs in a conveyance of the land. After that the plaintiff, as such receiver, procured her dower to be admeasured and set off, and then brought an action of ejectment, claiming to be the owner of the lands so set off by virtue of his appointment as such receiver. No assignment had been executed to the receiver. This case then presented the same question now under consideration, and the court held that the action could not be maintained against the purchaser. The opinion, which was unanimously concurred in by all the members of the court, adopted the views of Judge COMSTOCK, above quoted, and commands our respect by the force of its reasoning. We fully concur in the opinion and in the result arrived at.

Personal property is usually held by mere possession without any other evidence of title, and may be passed from hand to hand in the same way, and it is well enough to allow the title to that kind of property to vest in a receiver without any assignment, because he can take actual possession of it and dispose of it for the purposes of the trust; but real property is held by a very different tenure, and it is important that there should be some muniment of the title, and some evidence of its transmission from one to another. We put our decision on the ground that the receiver took no title to the premises which he assumed to convey to the plaintiff, and that the plaintiff acquired no interest in the same by the conveyance from



the receiver, and has no interest that will enable him to maintain this action.

The judgment must be reversed, with costs.

Present — GILBERT and DYKMAN, JJ. BARNARD, P. J., not sitting.

Judgment reversed and new trial granted, costs to abide event.

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SARAH SHERWOOD, RESPONDENT, v. THOMAS O. ARCHER  
AND EMILY E. ANDERSON, APPELLANTS.

*Usury — substitution of new note for old one — rights of bona fide holder.*

One Treadwell held an over-due promissory note given by the defendants which was void for usury. Treadwell being indebted to the plaintiff to the amount of the said note, a note was given by the defendants, payable to the order of the plaintiff, and the same was subsequently delivered to her, she being ignorant that Treadwell had received any usurious interest from the defendants.

In an action by her upon the second note, *held*, that the plaintiff was entitled to recover; that the defendants, by making the note to her order, represented to her that the transaction in which it was given was a lawful one, and that they were estopped to deny the truth of this representation. (DYKMAN, J., dissenting.)

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the County Court of Westchester county without a jury.

The action was brought upon a promissory note given by the defendants. The defense was usury.

*Eugene Archer*, for the appellants.

*Amherst Wight, Jr.*, for the respondent.

GILBERT, J.:

The evidence given upon the trial not being before us, we must take the findings of the court below upon questions of fact as conclusive. One of these findings is, that the note in suit was given

in renewal of a previous usurious note made by the defendant Archer, payable to and held by one Treadwell. That Treadwell delivered the note in suit to the plaintiff, to whom by its terms it is payable, in payment of his indebtedness to her, amounting to \$200; that the plaintiff received none of the usurious interest paid by Archer, and did not authorize Treadwell to receive, or know that he had received any illegal interest. The taking of the note in suit by the plaintiff, in payment of Treadwell's indebtedness to her, was a perfectly legitimate transaction, and constituted her a holder for value, and if she took the note in good faith and without notice of the usury in the previous note, those facts are sufficient to establish her right to recover upon it. By making the promise directly to the plaintiff, the defendants in fact represented to her that the transaction in which the note originated was a lawful one, and they are estopped to deny the truth of that representation. The release of Treadwell's indebtedness was a sufficient consideration for the defendants' promise, and the promise, having been made to one who was not privy to the usurious agreement between Treadwell and the defendants, upon a new and independent consideration, is valid, and not affected by such usurious agreement. The principle that a new security is infected with the taint which invalidated the former one, does not apply to an innocent holder of the new security, who took it directly from the debtor. (*Ellis v. Warnes*, Cro. Jac., 33; *Cuthbert v. Haley*, 8 T. R., 390; *Jackson v. Henry*, 10 Johns., 185; *Powell v. Waters*, 8 Cow., 691; *Holmes v. Williams*, 10 Paige, 329; *Aldrich v. Reynolds*, 1 Barb. Ch., 43.) The legal effect of the transaction is the same as if the defendants had borrowed of the plaintiff the money wherewith to pay the usurious note held by Treadwell, and had given the note in suit therefor. An argument that a lender of money cannot recover on such a note, because the money loaned was used to pay a usurious debt of the maker of the note, would hardly be listened to. Although the means furnished by the plaintiff by which the debt of the defendants to Treadwell was paid were not in the form of money, yet they were equally efficacious, and the promise of the defendants should be held equally valid and binding. (*Hawks v. Weaver*, 46 Barb., 164.)

It has been suggested that the transaction was a mere device to evade the statute of usury. The court below did not find that fact.

Those who allege illegal acts must prove them. In the absence of such proof, the legal presumption is that the fact alleged was not proved.

The intention of Mrs. Anderson to charge her separate estate for the payment of the note, sufficiently appears from the written declaration to that effect appended to the note. That declaration bears the same date as the note, and the court below, in effect, found that they were made and delivered at the same time. They, therefore, formed, together, but one instrument. It is not essential that such declaration should appear in the note itself. (*Corn Exchange Ins. Co. v. Babcock*, 42 N. Y., 613; *Manhattan Co. v. Thompson*, 58 id., 82.) The contract is a valid one, notwithstanding it was not made in the course of the separate business of Mrs. Anderson, nor for the benefit of her separate estate, and it may be enforced as a legal liability. (42 N. Y., *supra*; *First Nat. Bank v. Garlinghouse*, 53 Barb., 615; *Ainsley v. Mead*, 3 Lans., 116; *Monilaws v. Andrews*, 8 Hun, 65.)

The judgment should be affirmed.

DYKMAN, J. (dissenting):

On the 3d day of June, 1874, Thomas O. Archer, the defendant, executed and delivered to Devoe Treadwell his promissory note for \$200, payable five months after date, with interest, and received from Treadwell for the note \$180 only. When this note became due Archer requested an extension of time for its payment, and, to procure the same, executed and delivered a new note to Treadwell for \$200, and paid to him the interest on the first note and a bonus of ten dollars. Both of these notes were payable to Treadwell's own order, and, when the second note became due, Archer applied for another extension of time, which was granted upon Archer giving the following note to Treadwell:

"WHITE PLAINS, April 2, 1875.

"Six months from date, for value received, we severally and jointly promise to pay Sarah Sherwood two hundred dollars, with lawful interest.

"THOMAS O. ARCHER.

"EMILY E. ANDERSON.

"I, Emily E. Anderson, one of the makers of this the above note, being a married woman, do hereby charge my separate estate with the payment of the above note.

"Dated *April* 2, 1875.

"EMILY E. ANDERSON."

Treadwell was indebted to the plaintiff, and after he had received this note he delivered it to her, and she brought this action upon it in the County Court. The cause was tried without a jury, and the county judge has found the facts as they are here stated, and gave a judgment in favor of the plaintiff for the full amount of the note against both of the defendants.

The case now comes into this court upon appeal from that judgment. No case has been made, and we have nothing before us but the judgment roll, containing the findings and the exceptions of the defendants thereto.

From the foregoing statement it appears that the note in suit was given in substitution of the liability of Thomas O. Archer upon the second note, which was usurious in its inception, and was, therefore, only the continuance of a usurious loan, which had been aggravated by two renewals. It is true this note was taken in the name of the plaintiff, and if this device can be made to succeed, then the usury laws will soon be trampled under the feet of the avaricious money-lender. Extortion will become rampant in the land, and the legislation for the suppression of this evil will become a by-word and a reproach.

The vigilant eye of a court of justice is not to be turned aside by so simple a make-shift or a simple change of papers. The real facts in the transaction must control.

In such a case as this, where the first security is tainted with usury, no matter how often it may be renewed, nor in whose name or in what form the renewals may be, they are all corrupted by the same taint of usury, and are all void. (*Walker v. Bank of Washington*, 3 How. [U. S.], 62; *Tuthill v. Davis*, 20 Johns., 285; *Bridge v. Hubbard*, 15 Mass. Rep., 96.) Neither is the fact that the plaintiff was not privy to the usurious bargain of any importance. (*Bridge v. Hubbard*, *supra*; *Vickery v. Dickson*, 35 Barb., 96; *Jacks v. Nichols*, 5 N. Y., 178.) As this judgment must, therefore, be

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SECOND DEPARTMENT, FEBRUARY TERM, 1877.

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reversed on this first ground, it will be unnecessary to consider the case in respect to the liability of the defendant Emily E. Anderson.

The judgment should be reversed and new trial granted, with costs to abide the event.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment of County Court affirmed, with costs.

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ANDREW JENNINGS, PLAINTIFF, v. MARGARET CONBOY AND OTHERS, DEFENDANTS.

*Powers — must be either beneficial or in trust — when invalid.*

One clause of a testator's will was as follows, viz.: "I give full power and authority and control to sell my property in Brooklyn to my sister, Mrs. Conboy, and to receive the rent of it — house No. 865, Pacific street, Brooklyn." *Held*, that the testator created, if anything, a power, but as such power was neither beneficial or in trust, it was not authorized by the Revised Statutes, and that as to such real estate he died intestate.

MOTION for a new trial under section 268 of the Code, after a judgment had been rendered in favor of the plaintiff, directing the usual reference in partition, and for an accounting.

*R. P. Hope*, for the motion.

*Elial F. Hall*, opposed.

DYKMAN, J.:

This is a partition suit founded on chapter 238 of the Laws of 1853. Section 2 of that law reads as follows: "Any heir or heirs claiming lands, tenements or hereditaments by descent from an ancestor, who died holding and being in possession of the same (whether such heir or heirs be in possession or not), may prosecute for the partition thereof, notwithstanding any apparent devise by such ancestor, and any possession held under the same devise, provided that such heir or heirs shall allege and establish in the same suit, action or proceeding that such apparent devise is void." John Jennings departed this life in the city of New York on the 25th day of January, 1873, leaving him surviving the plaintiff, his brother,

the defendant, Mrs. Conboy, his sister, and the other two defendants, his nieces, his only next of kin and heirs at law. He left a last will and testament, which was made and dated on the 10th day of January, 1873, and which has been duly proved and admitted to probate. At the time of his death he was the owner of the premises described in the complaint in this action, and that portion of the will which has any reference to it, is as follows: "I give full power and authority and control to sell my property in Brooklyn to my sister, Mrs. Conboy, and to receive the rent of it — house No. 865 Pacific street, Brooklyn." On the 10th day of February, 1873, Mrs. Conboy made a deed of conveyance of these premises to William Hanlen, and either the same day or the next Hanlen reconveyed the same to her, and she now claims to own the premises in fee under an execution of the power in the will. On the other hand, the plaintiff and the other defendants claim that the devise is void.

It is the duty of the courts to give force and effect to every last will and testament, and to carry its provisions into execution, if it can be done consistently, and in accordance with the rules of law on that subject. This is upon the principle that the owner of property has the legal right to give such directions to it after his death as he shall deem prudent and proper, provided such direction is consonant with the law. Now, if this provision in this will has any validity at all, it must be valid as a power, and as the creation, construction and execution of powers are now with us governed by our statutes on that subject, this devise must be tested by their provisions; and powers, as authorized by them, are general or special, and beneficial or in trust. (1 R. S., 732, article, Powers.) This is not a power in trust, either general or special, because no person or class of persons, other than the grantee of the power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits, to result from the alienation of the lands according to the power, and because the disposition which it authorizes is not limited to be made by any person other than the grantee of the power. (734, §§ 94, 95.) Neither is this a special power, because no persons or class of persons are designated to whom the disposition of the land under the power is to be made, and the power does not authorize the alienation of any particular estate or interest less than a freehold. (726, § 38.) It is a general power, because it authorizes the

alienation in fee of the lands embraced in the power to any alienee whatever. (732, § 77.) To be valid, however, it must be beneficial as well as general. Is it such? "A general or special power is beneficial where no person other than the grantee has, by the terms of its creation, any interest in its execution." (§ 79.) It would seem to be a fair deduction from this section that to render a general or special power a beneficial one the grantee of the power must have an interest in its execution. Here the grantee of the power has no interest in its execution; and not only so, if the power could be exercised by a sale of the land the proceeds would, of course, take the direction which would be given them either by this will or by the law, and either direction would make others beside the grantee interested.

As this examination of the statutes shows that this provision is not valid as a power, its entire invalidity follows; and it likewise follows that, as to his real estate, the testator died intestate. The case was, therefore, properly disposed of at Special Term, and the motion for a new trial must be denied, with costs.

Present — GILBERT and DYKMAN, JJ. BAERNARD, P. J., not sitting.

Motion for new trial denied with costs.

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SAMUEL L. MULFORD, RESPONDENT, v. ELINER HODGES  
AND EDWARD F. HODGES, APPELLANTS.

*Divisible and indivisible claims — how distinguished — Assigning of portion of indivisible claim — effect of.*

In an action brought against four defendants, an attorney appeared and put in answers for all of them, and appeared for and defended their interests upon the trial. Subsequently, he having assigned to the plaintiff herein his claim against two of the said defendants, the assignee brought this action against the said two defendants and recovered the whole amount of the attorney's claim.

*Held*, (1) that the claim of the attorney against the four defendants was an indivisible one;

(2) That the assignment to the plaintiff did not assign the whole claim to him, and, the claim being indivisible, did not invest him with any separate portion of it.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

*Wyllys Hodges*, for the appellants.

*Wm. M. Mullen*, for the respondent.

DYKMAN, J.:

In April, 1871, the Ocean National Bank of the city of New York commenced an action in the Supreme Court against Eliner Hodges, George W. Hodges, Edward F. Hodges, and Annie F. Hodges, to set aside a conveyance of certain real estate from George W. Hodges, to Edward F. Hodges, and from Edward F. Hodges and wife to Eliner Hodges. Robert Christie, an attorney and counselor at law, was employed by George W. Hodges to defend the action. Mr. Christie put in answers for all the defendants, which he subscribed as the attorney for the defendants, and at the trial appeared and defended for all the defendants.

On the 15th day of May, 1874, Mr. Christie assigned his claim against Eliner Hodges and Edward F. Hodges to the plaintiff, and this suit was commenced to recover for his services in that action. From the foregoing statement it appears that Mr. Christie was the attorney for all the defendants in the bank suit; that he appeared for all, answered for all, and defended for all; and that now the plaintiff, under an assignment of his claim for services against two of these defendants, claims to recover in this action the full value of those services; that is, the entire claim that Mr. Christie had against all the defendants for his services in the original action.

This cause was tried before a referee, who reported in favor of the plaintiff for the full amount of the plaintiff's services, and judgment has been entered upon the report, from which the appeal is taken.

We think there is a radical difficulty in the way of the plaintiff's recovery in this action. Mr. Christie had four persons who were indebted to him jointly for professional services; he assigned his claim for services against two of them, and the plaintiff has been permitted to recover on that assignment in an action against the two the full amount of the claim against the four. If Mr. Christie



had any claim for his professional services in the original action, it was for services rendered for all, and under one employment for all. The services were all rendered and performed under the same contract, and his demand for compensation was an entire demand against the four defendants. His claim rested upon one contract and one transaction; or, rather, upon transactions in relation to one subject.

Much has been said in relation to this subject of entire and divisible demands, and our courts have not been entirely harmonious in relation to the rule by which it may be determined whether a claim is entire and indivisible or not. Some of the cases go far enough to hold that every account or claim consisting of different items, the whole of which is due, is an entire demand and incapable of division for the purposes of prosecution, while others hold that it is necessary that the claim should have arisen out of a single transaction, or be connected together by contract in order to make it indivisible.

The following rule has been laid down on this subject by our Court of Appeals: "The true distinction between demands or rights of action which are single and entire and those which are several and distinct is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass or conversion or fraud gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts expressed or implied, each contract affords one, and only one, cause of action." (*Secor v. Sturgis*, 16 N. Y., 558.) It is not important in this case to follow the principle of law on the subject any further, for within all the cases the claim of Mr. Christie was an entire and indivisible demand against four persons.

What, then, was the effect of the act by which he undertook to assign his claim against two of those persons for this entire demand? Did it accomplish any thing more than make the assignee a joint owner with him of the entire demand? We think it did not; at all events it did not assign the entire claim, and did not vest the assignee with the whole cause of action. It did not vest him with

any portion of the claim, because, within the rule above stated, that was an entire thing and could not be divided. If this be so, then plaintiff, as such assignee, took no separate interest in this claim; that is, he took no title which gives him a cause of action against these two defendants. Christie had no cause of action against these defendants alone, to give him.

This is not the case of a failure of the joinder of proper parties as defendants, which ought to have been pleaded, but it is the case of a party bringing a suit without any cause of action. The foundation of this action has failed, and he cannot recover for that reason. But the referee, before whom the cause was tried, not only permitted the plaintiff to maintain his action, but allowed him to prove and recover the entire value of Mr. Christie's services in the original litigation. This would be wrong, even if the claim was a divisible one. The assignment only purports to give the plaintiff the claim against the defendants for the services of the assignor, and the judgment allows him to recover for the whole claim of the assignor against all the original defendants.

If this action had been commenced by the assignor in his own name against these two defendants for his services, it might possibly be said that they would be called upon to plead the non-joinder of their co-obligers, because in that case the claims would be a subsisting demand and a valid cause of action in the hands of, and belonging to the plaintiff. But in this case the plaintiff was not the owner of the entire claim for the services, and had not, therefore, any cause of action against any one for it. In any view, therefore, this judgment must be reversed.

Judgment reversed and a new trial granted, with costs to abide the event.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment reversed, and new trial granted at Circuit, costs to abide event.

## IN THE MATTER OF BENJAMIN VALENTINE, A LUNATIC.

*Lunatic—sale of real estate of—jurisdiction of court—reference to ascertain facts—when necessary.*

Upon an application for the sale of the real estate of a lunatic, the petition alleged that the only real estate belonging to him was that therein described; that it was necessary for the support and maintenance of the lunatic that this should be sold, and that the committee had, subject to the approval of the court, entered into an agreement for the sale thereof at a price therein specified. Upon the presentation of the petition, an order was made, no reference having been ordered, directing the sale of the real estate to the person with whom the contract had been entered into. *Held*, that the court had jurisdiction to direct the sale to be made, and the title acquired by the purchaser thereunder could not be attacked collaterally, even though the proceedings might have been, in some respect, irregular.

*Semble*, that it is not obligatory upon the court either under the Revised Statutes (2 R. S., 53, § 12) or under the act of 1864 (chap. 417) to order a reference to ascertain the truth of the facts set forth in the petition, when it has satisfied itself of the existence of these facts and the propriety of ordering the sale by any other means.

APPEAL from an order made at Special Term denying a motion made by one Jacob Haff, to compel the committee of a lunatic to amend proceedings heretofore instituted by them for the sale of real estate belonging to said lunatic.

*D. P. Barnard*, for the appellant.

*John J. Armstrong*, for the committee, respondent.

DYKMAN, J.:

On the 6th day of August, 1873, Curtis S. Smith, the committee of the person and estate of Benjamin Valentine, a lunatic, presented a petition to the Supreme Court, in which he stated that the only real estate belonging to the lunatic was a parcel of land therein particularly described, and that the lunatic was the owner of that parcel; that it did not produce any income; that there was no personal property belonging to the lunatic, except a small quantity of household furniture, and that it was necessary for the support and maintenance of the lunatic and his wife and children that this

real estate should be sold. That the committee had, subject to the approbation of the court, entered into an agreement with one Jacob Hoff, of Hempstead, for the sale to him of the real estate mentioned and described in the petition for the sum of \$2,300, to be paid upon the delivery of the deed therefor, which sum was the highest amount that he could obtain therefor. Wherefore, the petitioner asked that he might be authorized to sell the land so mentioned and described, that the contract which he had made therefor might be affirmed, and that such other and further order might be made as should be just. Whereupon, an order of the court was made and entered, whereby this report of the committee and the sale therein mentioned, was ratified, approved and confirmed, and whereby it was further ordered that the said committee execute and deliver to the said Jacob Hoff, the purchaser named, a good and sufficient conveyance of the piece or parcel of land sold, upon receiving the purchase-money agreed upon, and that the said committee, after paying out the costs of the proceedings, and the other necessary expenses of effecting the sale, pay the residue of the proceeds of the sale to the county treasurer of Queens county, to be invested by him, and paid out by him on the order of the court, and that the committee, before receiving the proceeds of the sale, should give additional security by a bond, with two sureties, to be approved by a justice of this court, conditioned for the faithful application of and accounting for the proceeds of the sale. In pursuance of this order, a deed of conveyance was executed by the committee to Jacob Hoff on the 20th day of August, 1873, which was delivered and accepted; the money was paid and the purchaser went into possession of the land. On the 1st day of July, 1876, Jacob Hoff entered into a contract to sell and convey the land, and the purchaser has declined to consummate the contract because, as he alleges, Hoff got no title by his conveyance to him, on account of certain irregularities in the proceedings which led up to that conveyance, and he made a motion at the Special Term that the committee should be required to amend his proceedings or institute new ones for the purpose of perfecting his title, or refund the purchase-money.

This motion was denied at Special Term, and the case comes to us, on appeal from that order.

Courts of equity have power to direct the sale of lands owned by a lunatic, but they are all statutory and independent of the provision of our statutes on the subject, the courts of this State have no jurisdiction to entertain these proceedings for any purpose whatever. For the purpose of securing their validity, therefore, proceedings in the courts, for the sale of the lands of a lunatic, must be had in substantial compliance with the statutes of the State on that subject. By the Revised Statutes, the committee of a lunatic may apply to the court for authority to sell the real estate of the lunatic, in two cases: First; when his personal estate is insufficient for the discharge of his debts; and, second; when the personal property of the lunatic, and the rents of his real estate, are insufficient for the maintenance of himself or his family, or for the education of his children. The application must be by petition, which shall set forth the particulars and amount of the estate, real and personal, of the lunatic, the application which may have been made of any personal estate, and an account of the debts and demands existing against his estate, on the presentation of this petition. It must be referred to a referee or the clerk of the court to inquire into and report upon the matters contained in the petition, whose duty it is to examine into the truth of the representations made, to hear all parties interested in such real estate and to make a report thereon. If, upon the coming in of the report, and an examination of the matter, it shall appear to the court that the personal estate of the lunatic is not sufficient for the payment of his debts, and that the same has been applied to that purpose, an order shall be entered directing the sale of the whole or a part of the real estate as may be necessary. By the statute the same facts are required to be stated in the petition, and the same proceedings had in the last case as in the first. (Revised Statutes, vol. 2 [1st ed.], chap. 5, title 2, pages 53, 54.) Then came the act of 1864, which provided that whenever it shall appear that a disposition of the real estate of a lunatic is necessary and proper, either for the support and maintenance of such lunatic or for his education, or that the interest of such lunatic requires or will be substantially promoted by such disposition, on account of any such part of such property being exposed to waste and dilapidation, or on account of its being wholly unproductive, or when the same has

been contracted to be sold and a conveyance thereof cannot be made by reason of said lunacy or for any other peculiar reason or circumstance, the court may order the letting for a term of years, or the sale or other disposition of such real estate or interest to be made by such committee, in such manner and with such instructions as shall be deemed expedient. That, upon an agreement for the sale, leasing or other disposition of such property being made, the same shall be reported to the court on the oath of the committee making the same, and if the report be confirmed a conveyance shall be executed under the direction of the court, and that all sales, leases, disposition and conveyances made in good faith by such committee in pursuance of such orders, shall be valid and effectual as if made by such lunatic when of sound mind. (Laws of 1864, chapter 417.)

From these recitations of the statutes it appears that there were sufficient facts stated in the petition, to enable the court to entertain jurisdiction of the proceedings and order the sale of the property, for it was stated therein that the sale of this real estate was necessary for the support and maintenance of the lunatic and of his wife and children. This is a sufficient statement under the Revised Statutes or the statute of 1864, for, under both, one case in which the real estate of a lunatic may be sold by order of the court is where it is necessary and proper for the support and maintenance of such lunatic. The court then obtained jurisdiction by the presentation of the petition; but it is claimed that the sale ordered by the court was ineffectual to vest the title in the purchaser, by reason of certain irregularities in the proceedings. On the presentations of the petitions no order of reference was made as required by the statute, but the court made an order confirming the sale and ordering a conveyance. When an order of reference is made in these and similar proceedings it is for the purpose of informing the conscience of the court, and if any other means is adopted to accomplish the same end they are equally effective. The Revised Statutes contemplate that the court shall make an examination of the matter, even after the reception of the referee's report, and we suppose that examination can be made without any order of reference, or any referee's report. Besides, this statute of 1864 does not, in terms, require any order of reference, and we suppose these proceedings were had under that act.

But suppose there are irregularities or omissions, or even errors in the proceedings, so long as the court had jurisdiction and was competent to make the order it cannot be attacked collaterally. The adjudication is valid so long as it is permitted to stand unreversed, and the statutes above cited provide that all sales made in good faith, in pursuance of such order, shall be as valid and effectual as if made by such lunatic when of sound mind. This must be held to mean that the purchaser under these proceedings, will be vested by the deed of the committee with the same title that the lunatic had when he was of sound mind, and at the time the committee was appointed, and this entirely independent of the question whether the proceedings are regular or irregular.

These considerations lead us to the conclusion that the purchaser under the order of August 6, 1873, obtained all the title of the lunatic and that there is no occasion for any amendment of the proceedings.

Order appealed from affirmed, with costs and disbursements.

GILBERT, J., concurred. BARNARD, P. J., not sitting.

Order affirmed, with costs and disbursements.

# MEMORANDA

OF

## CASES NOT REPORTED IN FULL.

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THOMAS D. CANDY, RESPONDENT *v.* ABRAM D. CANDY,  
APPELLANT.

*Breach of contract — measure of damage — Agreement to reside with person in consideration of board, etc. — Sale of furniture made necessary by so doing — loss upon such sale — cannot be recovered in action for breach of contract.*

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

This action was brought to recover damages sustained by the plaintiff in consequence of a breach, by the defendant, of a contract by which the plaintiff was to live with, and take care of the defendant until his death, and to receive therefor his board and clothing and that of his wife. At the time of making the agreement the plaintiff was keeping house in Philadelphia, and when he left there in order to reside with the defendant at the latter's residence at East Hampton, Suffolk county, New York, he sold his furniture, alleged by him to be worth \$470.13, for fifty-one dollars. This loss he sought to recover in this action, as one of the items of the damages sustained by him through the breach of the contract.

The court at General Term said: "I have not been able to discover any case which authorizes the recovery of the alleged loss upon the sale of plaintiff's furniture in Philadelphia. Assuming the agreement as proven by plaintiff, he was to remain with defendant during his natural life, to take care of him and be his companion, 'for which service I was to receive the board and clothing for myself and wife.' The sale of the furniture was one of the sacrifices which plaintiff made to be able to enter into the contract. Defendant did not agree to pay the loss on the



sale of the furniture, nor did he request a sale to be made at a sacrifice. The loss upon the furniture did not in any sense result from a breach of the contract. The defendant did not agree to restore the furniture sold, in case of a breach of the contract by him. The furniture did not enter into the contract, nor does the loss upon the sale thereof flow from the breach of the contract. It was, therefore, error to admit the proof of loss on the sale by plaintiff, under defendant's objection.

The judgment should be reversed and a new trial ordered, costs to abide event."

*J. Lawrence Smith*, for the appellant. *E. A. Carpenter*, for the respondent.

Opinion by BARNARD, P. J.

GILBEET, J., concurred. DYKMAN, J., not sitting.

Judgment and order denying new trial reversed, and new trial ordered, costs to abide event.

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BERNARD SHERIDAN, APPELLANT, v. STEPHEN C.  
JACKSON AND OTHERS, RESPONDENTS.

*Receiver*—right of a person not a party to the action in which a receiver was appointed, to maintain action against him for money collected.

APPEAL by the plaintiff from a judgment dismissing his complaint, and also from an order granting extra allowances and costs to four of the defendants in the action.

The plaintiff alleged in his complaint that on the 19th day of November, 1856, he was entitled to the possession of certain lands and premises which are particularly described, and to the rents, issues and profits thereof, and that he has ever since been so entitled and still is. That, in January, 1870, an action was commenced in the Supreme Court, in which all the defendants (but not the plaintiff) in this action were parties, except the receiver Cameron, some as plaintiffs and the others as defendants, in which the rights and interests to and in the said lands and premises, and the rents and profits thereof as between those parties were litigated. That the defendant Cameron was appointed by the court a receiver of the

rents, issues and profits of the premises in that action, and that as such receiver he had received certain rents and profits amounting to a large sum. That the plaintiff had demanded the money so received from the receiver, which he had refused to pay.

The complaint then asked that the receiver account to the plaintiff for all the moneys received by him in that action as such receiver, and that he be restrained from paying the same to any other person during the pendency of this action. No demand was made for the recovery of the premises or any part of them.

The case came on for trial at Special Term, and the plaintiff's counsel admitted that no permission had been given by the court to commence this action; that the plaintiff had been out of possession of the premises for several years last past, and that during that time the defendants had been in possession of the same, until the appointment of the receiver in that action. That the plaintiff was not a party to the action in which the receiver was appointed. The court thereupon dismissed the plaintiff's complaint, and judgment was entered against him, on the ground that the facts which it alleged did not constitute a cause of action in favor of the plaintiff, and because, taken in connection with the facts which were admitted on the part of the plaintiff, it appeared that he had no cause of action.

The General Term said: "The receiver holds the fund now in his hands, subject to the order of the court, and that order can only be made with reference to the rights and interests of the parties to the first action, after those rights are determined therein; at all events the plaintiff shows no right to have the fund divested from that direction. To say simply that he is entitled to this fund, in view of all the facts disclosed, is not sufficient. It appears that the defendants claim the rents, and that the receiver holds them subject to the determination of their claims, and yet the plaintiff wants a judgment against the receiver alone that shall give him the fund. He does not want his right to it as between him and the defendants determined. He does not want any relief as against the other defendants at all. He does not even ask any adjudication in respect to his right to the rents, but assumes that he is entitled to them, and that the receiver was bound to pay them over to him on demand precisely as if they were moneys had and received for the plaintiff. We think the court below was right in dismissing the plaintiff's

complaint, and that the judgment appealed from must be affirmed, with costs.

An additional allowance of \$350 was granted to four of the defendants, and the plaintiff has appealed from that order. Whether the defendants should have costs or allowances, was entirely in the discretion of the court. It is quite true that such discretion can be controlled by the court in banc, if it was unreasonably or improperly exercised; but we do not think it was. The plaintiff had brought these parties into court on a very weak pretense of right, and then stated a case which showed he ought not to recover. Under these circumstances, we think it was very proper for the court, as far as possible, to indemnify these parties by costs and reasonable allowances.

The judgment and order appealed from must be affirmed, with costs."

*Culver & Stroudy*, for the appellant. *Edward M. Shepard*, for the respondent Jackson. *John Andrews*, for respondents G. A. Andrews and others.

Opinion by DYKMAN, J.

BARNARD, P. J., concurred. GILBERT, J., not sitting.

Judgment and order affirmed, with costs.

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THE LONG ISLAND RAILROAD COMPANY, APPELLANT,  
v. JAMES BENNETT AND OTHERS, COMMISSIONERS OF HIGH-  
WAYS, ETC., AND OTHERS, RESPONDENTS.

*Chap. 287 of 1874—constitutionality of—Right of eminent domain—notice to persons affected by exercise of—Damages—measure of—assessment of—upon property benefited.*

APPEAL from a judgment at Special Term in favor of the defendants.

The action was brought to restrain the defendants from opening and grading Front street, between West First and West Second streets, in Long Island City, and from assessing upon or collecting from the property or premises of the plaintiff the damages or

expenses of opening said street, and to have the act of the legislature under which the defendants claim authority to act, viz., an act entitled "An act to provide for the opening of Front street, in Long Island City, Queens county," passed April 29, 1874, and the acts of the defendants thereunder declared unconstitutional and void, and said defendants restrained from exercising any authority sought to be conferred by said act.

This act, by its terms, authorizes the commissioners of highways of Long Island City to open said street, authorizes the application for appointment of commissioners to assess the damages, and directs the damages and expenses of grading to be assessed upon and collected from the lands adjoining benefited thereby, and paid out to the parties entitled thereto.

The court at General Term said: "The proceedings, in this case, to take the land are expressly authorized by chapter 287 of the Laws of 1874, but the validity of that statute is assailed on the ground that it violates the Constitution; because, first, it contains no provision requiring notice to be given of the application for the appointment of commissioners to appraise the land taken for the improvement, and to impose the assessment for the expense thereof; second, the area of assessment is limited to the lands adjoining benefited by the improvement, and the amount of the assessment is not restricted to the amount of benefit which said lands will derive from the improvement; and third, it does not provide, with sufficient certainty, for the payment of the compensation to be awarded for the property taken.

We think neither of these objections is well taken. The Constitution does not require notice of the application for the appointment of commissioners. It appears, however, that notice was given by publication and the plaintiff appeared. That was a waiver of the objection and rendered it unavailing. (*Dyckman v. The Mayor*, 5 N. Y., 441; *People v. Quigg*, 59 id., 83.)

The court below has found that the plaintiffs are the sole owners of the land adjoining the street to be opened, and the statute cited provides that the damages which they will sustain by the taking of their land for the street, together with the expense of grading the street, shall be assessed upon such adjoining lands. This, I agree, is a hard mode of making compensation; but, if lawful, it must be

certain and adequate. That it is lawful seems to be settled in this State. (*Livingston v. The Mayor*, 8 Wend., 85.) In that case it was held, by the late Court for the Correction of Errors, that the benefit, accruing to a person whose land was taken for a street, might be set off against the loss or damage sustained by him by the taking of his property; and, if equal to the damage or loss, it was a just compensation for the property taken to the extent of such benefit. In this case the plaintiff's damages must be so much less than the benefit which they will derive from the improvement, as the amount it will cost to grade the street."

*Vanderpoel, Green & Cuming*, for the appellant. *Edgar M. Cullen*, for the respondents.

Opinion by GILBERT, J.

BAERNARD, P. J., and DYKMAN, J., concurred.

Judgment affirmed, with costs.

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IN THE MATTER OF DAVID R. RYERS AND OTHERS, COMMISSIONERS, ETC., FOR AUDIT OF ACCOUNTS.

*County judge — when interested, may request judge from another county to hold court.*

APPEAL from an order of the County Court of Richmond county, auditing and confirming the accounts of certain drainage commissioners, appointed under chapter 888 of the Laws of 1869, amending the Revised Statutes in relation to drainage lands.

The court at General Term said: "There was no error committed in the reception or exclusion of evidence, and none is complained of by the appellants. No complaint is made of any want of notice, nor of any irregularity in the proceedings, nor that the proceedings were not conducted in precise accordance with the requirements of the law. There is, however, a question of law raised by this appeal which has relation to the organization of the court which made the order appealed from. The county judge of Richmond county was disqualified from acting by reason of interest, and he made an order request-

ing the county judge of Kings county to hold the court at which these proceedings were had, and an objection is now made that this was irregular, and that the county judge of Kings county could not preside at the court. The objection is, that the county judge of Richmond county, being interested in the lands proposed to be drained, cannot designate the county judge who shall preside at the court which investigates these accounts. If this objection is well taken then the court was not properly constituted, and the order appealed from is not valid. By section 20 of the amendment of 1871 (chap. 303), it was enacted that: 'In case the county judge of any county where such proceedings are, or shall heretofore be, pending shall be personally interested in such proceedings, it shall be his duty to require the county judge of some other county to hold County Courts for the purpose of this act.' Again, the amended judiciary article in our present State Constitution provides: 'The county judge of any county may preside at Courts of Session or hold County Courts in any other county, except New York and Kings, when requested by the judge of such other county.' It will be seen by these provisions that a county judge of one county may preside at County Courts and Courts of Sessions in any other county in the State, except New York and Kings counties, but that he can only do so at the request of the county judge in whose county he is to preside. No disability is imposed upon a county judge who is interested in a matter to be investigated or adjudicated, which prevents him from calling another county judge to preside in his stead in such a case, for the very obvious reason that such interest will, in a very great majority of instances, be the sole and only cause for his making such a call; and, as there is no provision for making such requisition in any other way, or by any other person than the county judge, it would follow that no call could be made in any case where the county judge was interested, if the construction contended for by the appellant is the correct one. Whereas it will happen in practice that these are mostly the cases in which it is desirable such call shall be made. Besides, there is no reasonable objection to such a course. The county judge called will stand indifferent, though the one calling him does not, and the ends of justice will be accomplished by thus setting up an indifferent judge. The foregoing reasons satisfy us that the objection is not well taken. There are no other ques-

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SECOND DEPARTMENT, FEBRUARY TERM, 1877.

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tions raised by this appeal, and the order appealed from must be affirmed, with costs."

*George P. Avery*, for the appellants. *George J. Greenfield*, for the commissioners, respondents.

Opinion by DYKMAN, J.

BARNARD, P. J., and GILBERT, J., concurred.

Order affirmed, with costs and disbursements.

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WILLIAM VON SACHS, AS ASSIGNEE IN BANKRUPTCY OF JOHN  
F. SCHEPELER, APPELLANT, v. GEORGE C. KRETZ AND  
OTHERS, RESPONDENTS.

*Statute of limitations—effect of bankruptcy of debtor on running of—Counter-claim,  
in action by assignee in bankruptcy—reply to, by assignee.*

APPEAL from a judgment in favor of the defendants, entered upon the report of a referee. This action was brought by an assignee in bankruptcy to foreclose a mortgage. The defendant set up in his answer a counter-claim, to which no reply was made. The plaintiff insisted that the counter-claim was barred by the statute of limitations. As to this, the court at General Term said: "It is contended by the plaintiff that the statute of limitations is a bar to the defendants' set-off. It was not barred when the plaintiff became assignee in bankruptcy. He is, in effect, a trustee for the creditors of the bankrupts. The statute of limitations may have barred the right of action against the bankrupts, without affecting a set-off which existed at the time of the adjudication in bankruptcy. For the bankrupt act provides that, in all cases of mutual debts or mutual credits, the balance only shall be allowed or paid. (U. S. Rev. Stat., § 5073.) The statute of limitations does not extinguish the debt, but only bars the remedy. The debt may be revived by a subsequent promise without any new consideration. In this case six years had not elapsed, after the defendants' cause of action accrued, when the adjudication in bankruptcy was made. It does not appear whether the bankrupts were discharged or not. The

bankrupt act provides that suits against the bankrupt shall be stayed, pending the proceedings in bankruptcy. (U. S. Rev. Stat., § 5106.) During the continuance of this statutory prohibition (which, for ought that appears, may still be in force), the statute of limitations did not run. (Code, § 105.)

We think, therefore, that the defendants' set-off was not barred. (*Parker v. Sanborn*, 7 Gray, 191.) Nor was the plaintiff at liberty to take that objection. The defense falls within the definition of a counter-claim to which a reply must be put in. The plaintiff did not reply, and therefore admitted the defense. (*Isham v. Davidson*, 52 N. Y., 237; Code, § 168.)"

*James K. Hill*, for the appellant. *John H. Bergen*, for the respondents.

Opinion by GILBERT, J.

BARNARD, P. J., and DYKMAN, J., concurred.

Judgment affirmed, with costs.



# Cases

DETERMINED IN THE

## FIRST DEPARTMENT

AT

GENERAL TERM,

March, 1877.

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153a 322

ALFRED CLOCK, ADMINISTRATOR, ETC., APPELLANT, v. HENRY  
W. CHADEAGNE, RESPONDENT.

*Administrator—accounting by—next of kin must be parties to—Statute of limitations—how interposed in such proceedings.*

Where one of the next of kin of a deceased person, entitled to a distributive share of his estate, calls the administrator to an account, and, upon the hearing, claims to be entitled, by assignment, to the shares of three of the other next of kin, it is error to direct that the amount of said shares should be paid over to him, unless the persons originally entitled thereto are made parties to the proceeding, as otherwise the decree would afford no protection to the administrator.

A surrogate cannot entertain proceedings instituted by one of the next of kin of a deceased person against an administrator, to enforce the payment of a distributive share of the estate of the deceased, when such proceedings are not commenced before the expiration of the time within which the distributee might have brought an action under section 9 of 2 Revised Statutes, 114.

In such proceedings, no formal written pleading is necessary to entitle a party to the protection of the statute, but it must be set up or urged before all the evidence has been taken, so that the claimant may have an opportunity to introduce evidence which may relieve him from the operation thereof. (Per DAVIS, P. J., and DANIELS, J.)

*Van Vleck v. Burroughs* (6 Barb., 841)-followed.

APPEAL from a decree of the surrogate of the county of New York, confirming the report of the auditor appointed to settle the accounts of the appellant, as administrator of Elizabeth W. Sibell,

HUN—VOL. X. 13

deceased, and ordering the said administrator to pay certain distributive shares of the said estate to the respondent; and, also, an appeal from an order of the surrogate denying a motion to amend and correct the minutes of the auditor.

*Geo. H. Adams*, for the appellant.

*Lewis Beach*, for the respondent.

DAVIS, P. J.:

On the 5th of May, 1855, the appellant was appointed administrator *de bonis non* of the estate of Elizabeth W. Sibell, deceased. On the 16th of May, 1874, the respondent, as one of the next of kin, entitled to a distributive share in the estate of said deceased, filed his petition, averring that more than eighteen months had elapsed since the appointment of the appellant as such administrator; that he had never made any account as such administrator, and praying an order requiring him to render an account of his proceeding, and to show cause why he should not pay the petitioner the amount due to him by reason of the premises stated in the petition. The surrogate, on that day, made an order accordingly. The appellant appeared pursuant to said order, and produced an account, sworn to the 6th day of April, 1868, which appears to have been made to the surrogate and filed in his office at or about that time, and added thereto a further account of two items of expenses which he claimed to have paid on proceedings for the final settlement and allowance of his account above mentioned. To these two accounts, thus presented, the respondent filed numerous objections. Thereupon, an order was made referring the account to a referee and auditor, to hear the same and report his proceedings with all convenient speed to the surrogate. No steps were taken for a final settlement of the account, either on behalf of the appellant or of the respondent, and no citations were issued to the heirs and next of kin of the intestate. On the hearing before the auditor, the respondent, in addition to his own claim to a distributive share, as next of kin, claimed to represent and own, as assignee, the distributive shares, as next of kin, of four other persons who were not cited in the proceeding, and did not appear. In respect of two of these persons,

one of whom was deceased, the respondent testified on his own behalf, that he had received assignments of their shares in writing, which he did not produce before the surrogate, but stated that he had left them some years before in the hands of one Fowler, and did not now know where they were; and in respect to the other two shares, he testified that the parties had given their interest to him, and verbally assigned them before these proceedings were commenced. Upon this evidence, the auditor allowed to the respondent all of these four shares out of the amount which he found due from the administrator, in addition to his own; his own being twenty-two dollars and twenty-six cents, and the other four amounting to \$278.26. These allowances were excepted to, but the exceptions were overruled and the report of the auditor confirmed by the surrogate. We think the allowance of the shares upon the alleged assignments, was altogether improper. None of the next of kin having been cited or appearing on the hearing, the decree, as against them, would establish nothing, and would be no protection to the appellant as against any further proceedings that they might institute to recover their distributive shares. Before such a decree could be made, it would be essential that the alleged assignors, as next of kin, should be cited and brought in as parties to the accounting. This question was properly raised by the exceptions to the report.

The auditor also charged the appellant with interest on the sum of \$999.59 from the 24th of August, 1856, to the 16th of May, 1861, amounting to \$330.30. This is upon a sum received by the administrator on the 24th of July, 1856, and the auditor charged him with interest at the expiration of one month from the date of its receipt. But it appears that a suit was brought against the appellant in which a claim was set up for the whole of the amount so due, and a recovery was had against him on which he paid \$600. No reason whatever was shown for the allowance of interest, except the fact that the appellant kept the money on deposit in a bank in the account of his firm of "Clock & Miller," he keeping no separate account. But no evidence was given that it was ever, in fact, used in the business of that firm, or that the administrator ever received any interest for its use in any form whatever. The naked fact that he deposited the money in a bank under the circumstances stated by him, without additional proof that it was used for his benefit

or the benefit of his firm, or that he received interest on it, would not justify charging him with interest pending the period of the litigation in which it was impracticable to have made a settlement, so that the next of kin could receive any distributive shares. The charging of this interest upon such evidence as appeared before the auditor was improper.

The auditor also rejected both items of the subsequent account for proceedings upon the prior accounting. The result of that accounting is left indefinite. Nothing is shown as to what became of the proceeding; but one item of the account proved by the testimony of the appellant is twenty-five dollars for fees paid to the auditor on such accounting. That item, it seems to us, ought to have been allowed to the appellant.

The other item is for counsel fee paid to an attorney for legal services before the auditor. This was rejected, and its rejection, in the absence of further evidence in relation to the propriety of its allowance by the surrogate, was proper. The auditor seems to have rejected the charges of \$190. for legal services in the appellant's account. Vouchers were not produced for them; the rejection was, therefore, correct. But if they accrued in the course of the defense of the suit against the estate, and were reasonable and proper, and were necessarily expended in such defense, the appellant should have been allowed them upon proper evidence of their actual payment. His failure to produce that evidence, of course, justified the auditor in their rejection.

The auditor also allowed to the respondent compound interest on the amount of his own and the other distributive shares allowed to him from the 16th day of May, 1861, to the date of his report, amounting to \$511.73. This, however, the surrogate rejected. The respondent, in his answer to the petition, alleges this rejection as error, and insists that the decree of the surrogate, in that respect, should be reversed, and the allowance of compound interest by the auditor should be confirmed. We think, however, that the surrogate was entirely correct in disallowing compound interest; and it is very doubtful whether the allowance of simple interest, which was made by the surrogate, should be sustained, inasmuch as it appears that a considerable part of the amount which the surrogate has now charged had been paid out by the appellant, from time to

time, as early as 1863, and did not remain in his hands so that interest could have been received upon it by him.

The very great delay of more than fifteen years after the estate should have been closed in taking any steps for that purpose, on behalf of the respondent or any other of the next of kin, taken in connection with the fact that the fund had been almost wholly paid out upon claims which he, doubtless, supposed to be just and proper, may properly be considered as excusing him from the charge of interest prior to the time when the demand was made upon him by the respondent.

The statute of limitations was urged upon the auditor when the case was submitted to him, after the evidence was closed. It was also insisted upon, in the exceptions before the surrogate, upon the hearing, on the motion to confirm the auditor's report. That the statute of limitations may be used as a bar to such an accounting, as was sought for in this case, is established by the Court of Appeals in *Clark v. Ford* (1 Abb. Ct. App. Dec., 359); and in *McCartee v. Campbell* (1 Barb. Ch., 465). The decision in *McCartee v. Campbell* is cited and distinctly approved by the Court of Appeals in *Clark v. Ford*. Section 9 of 2 Revised Statutes, page 114 gives a right of action at the expiration of one year from the granting of letters of administration, if there be more than sufficient assets in the hands of the administrator to discharge the debts of the intestate. Nearly eighteen years had expired before the respondent commenced his proceedings after the time when his right to maintain that action had accrued. It is claimed that the present proceedings are a continuance of the proceedings commenced in 1868, but that is not correct in point of fact; for, according to the papers, this appears to have been an entirely new and original proceeding to compel the accounting, and not the continuance of some former proceeding in which an accounting had already been had. But it is insisted that the statute of limitations was not set up in time to avail the appellant. Formal written pleadings are neither customary, nor are they required in Surrogates' Courts (*Smith v. Remington*, 42 Barb., 75), and it has, in some cases, been held to be sufficient to allege defenses by way of exceptions to the auditor's report. But the latest case bearing on this question, which is *Van Vleck v. Burroughs* (6 Barb., 341), holds that the plea of the statute must

be set up or urged before the close of the evidence, so that the claimant may have opportunity to contest the same by proof which may relieve him from the operation of the statute. This we regard as the more just and sensible rule.

Upon the other grounds above suggested, the decree should be reversed, and the proceedings remanded to the surrogate for a new hearing, upon the petition and account, and with leave to interpose the plea of the statute, with costs to abide event.

DANIELS, J. :

The appeal taken in this cause is from the decree of the surrogate made on the final settlement of the administrator's accounts. Letters were issued to him on the 5th of May, 1855, and the order requiring him to appear and show cause why he should not pay the distributive shares of the estate, claimed by the respondent, was made on the 16th day of May, 1874. An account of the estate was made and filed by him on or about the 6th of April, 1868, and that was again presented as his account, when he appeared pursuant to the order referred to. On or about the 12th of February, 1875, a supplementary account was also presented by him for payments made by him for auditor's fees and counsel fees on the accounting after the account was first filed. On the 6th of October, 1874, the hearing and auditing of the account was referred to an auditor before whom the parties appeared on the 26th of February, 1875, and proceeded with the hearing. From that the auditor found that the respondent, in his own right and as assignee of other persons who were next of kin of the intestate, was entitled to be paid the sum of \$300.52, besides interest, and that the interest should be compounded on that balance from the 16th of May, 1861, until the date of the report. The charge for compound interest was afterwards rejected upon a hearing had upon the report before the surrogate.

It was also claimed that the charges made in the supplementary account, and disallowed both by the auditor and the surrogate, ought to have been credited to the administrator. They were specifically objected to, not because the payments had not been made as they were charged, but as being wrongfully incurred in resisting the accounting then commenced; and for the same reason they were rejected by the auditor. But no evidence whatever was given show-

ing that these expenses had been incurred in that manner. On the other hand, the evidence very decidedly tended to show that they had been incurred and paid in the orderly course of the proceedings which had then been instituted, and, for some unexplained reason, were not completed; and they should have been allowed as proper credits in favor of the administrator.

It was claimed, on the hearing had before the surrogate, that the administrator was protected against all obligation to account by reason of the lapse of time intervening between his appointment and the commencement of these proceedings; and as to that he was probably correct. But no objection of that kind was, in any form, taken or presented until after the hearing was had before the auditor, and the case was ready to be submitted for his decision and report. It has been held that no formal proceeding in the nature of a pleading is necessary for the purpose of entitling a party to the protection of the statute in proceedings before the surrogate. (*Smith v. Remington*, 42 Barb., 75; *McCartee v. Campbell*, 1 Barb. Ch., 456, 465.) But these authorities do not justify the position that the objection may be omitted until after the evidence has been all taken, and when urged, for the first time, upon the argument that it must be allowed to prevail. That would be unjust to the distributees claiming the estate, for it would deprive them of all opportunity of showing that they had been subject to legal disabilities, or any other cause, which, by the terms of the statute, would prevent it from taking effect against them.

When the statute is to be interposed as a defense to an action, it has been expressly provided that the objection can only be taken by answer. (Code, § 74.) And then the party may show as a reason why it should not be applied to the claim made by him, that he had been subjected to one or more of the disabilities which would suspend its operation; or that the administrator had been absent from the State, or imprisoned, or had, within six years, promised in writing to pay the demand made against him. (Code, §§ 100, 101, 102, 110.) And as far as the analogy of the proceedings before the surrogate will allow, the objection that they were not instituted in time, ought to be in some form taken while the other party may have the opportunity of protecting himself by proof, showing it inapplicable to his proceeding. No other course is just to the

other party or consistent with the spirit of the provision made by the Code that the objection can only be taken by answer. The object of this provision was to protect the opposite party against surprise by reason of the objection. It was designed to afford him an opportunity to meet the objection whenever that could be done by any proper proof within his power. And even if the form of the provision cannot be observed by proceedings in the Surrogates' Courts, its spirit and intent should be so far maintained as to require the objection to be timely made while the case is open for proof. The objection is one which, in many cases, may be obviated by evidence, and it should accordingly be presented before the time for producing such evidence has passed. And it was so held in *Van Vleck v. Burroughs* (6 Barb., 341). In that respect it should be treated and disposed of, as other objections are required to be considered in the course of legal proceedings. The party taking it should be required to apprise his adversary of his design to do so, while he may have the means and ability to protect himself against it. (*Fountain v. Pettee*, 38 N. Y., 184; *Levin v. Russell*, 42 id., 251.)

That was in no form done in this case while the hearing was proceeding, but the objection was for the first time taken, when the briefs were presented to the auditor for his consideration. It came too late, and the administrator was, for that reason, justly deprived of the effect he might have derived from it if it had been presented when the respondent had the opportunity to meet and avoid it by the production of further proof. (*Clinton v. Eddy*, 54 Barb., 54.)

An application was made to the surrogate for an order that the auditor's minutes should be so corrected as to show that the objection that the proceeding was not taken in time had been made before him. The success of the application rested in the discretion of the surrogate, and as the objection was delayed until the parties had closed their proofs and met to finally submit their case, it was properly denied. It would have been unjust to the respondent to place the proceeding in such a form as to give the administrator the benefit of the objection, even if that could have been done by such an order, when the time for avoiding it by evidence, on the part of the other party, had expired. And that would have been the effect if the application had been permitted to prevail. Its allowance was



within the power of the surrogate. (*Partridge v. Mitchell*, 3 Edw. Ch., 180.) But the sound exercise of it was exhibited by the denial which was made.

The case is entirely different from that of *Dakin v. Demming* (6 Paige, 95), where the objection that the surrogate had no jurisdiction of the subject-matter was allowed to be first presented on the hearing of the appeal. The objection arising upon the statute of limitations was not of that description, and could not be deferred in that manner by any support afforded to it by this decision.

The respondent made proof before the auditor, which had a tendency to show him to have received an assignment from some of the other next of kin. But, as to two of them, the transfer was claimed to have been by way of gift merely. There was no delivery of any account, order or direction in writing that he should receive any portion of the share of either. All that was done was limited to mere words, that the applicant might have their shares, each of which was under the sum of fifty dollars. This was not enough to effect a transfer of them. To consummate a gift there must be a delivery of the article given, or of some symbol or substitute for it. That was not done in this case, and therefore no effectual transfer of these shares was shown. As to the others, the evidence was materially defective. But, as no objection was taken to it on that account, the auditor may have been warranted in acting upon it as he did.

In the other respects mentioned, and also because the next of kin still appearing to be interested were not made parties to the proceeding, the necessity for which has been shown in the opinion of the presiding justice, the decree should be reversed, and a further hearing directed before the surrogate, with costs to abide the event.

BRADY, J., concurred in the result.

Decree reversed; proceedings remanded to the surrogate for new hearing upon the petition and account, with leave to interpose the plea of the statute; costs to abide event.

THE PEOPLE OF THE STATE OF NEW YORK EX  
REL. JAMES SKAHAN v. THE BOARD OF POLICE  
COMMISSIONERS OF THE CITY OF NEW YORK,  
RESPONDENT.

*Certiorari—Board of police commissioners of New York—trial before.*

On the return to a writ of *certiorari*, issued to review an order of the defendant, removing the relator from the police force of New York, it appeared that the relator was tried, upon charges preferred by his captain and sergeant, for neglect of duty, in failing to arrest two men fighting in the street, and with using improper language to Police Commissioner Erhardt when reproved therefor. The relator was brought before Commissioner Erhardt for trial, and, having been sworn, was asked what he had to say as to the charges, and testified in relation thereto. No other witnesses were examined. Erhardt made a report to the full board, and by the latter the relator was found guilty of a neglect of duty in failing to arrest the men, Erhardt not voting. *Held*, that the proceedings were regular, and that, as Erhardt was not the complainant, and was not examined as a witness, he was clearly not incapacitated from taking and reporting the testimony of the relator. (BRADY, J., dissenting.)

CERTIORARI to review an order of the board of police commissioners, removing relator from the police force of the city of New York.

*Wm. F. Howe*, for the relator.

*Charles F. MacLean*, for the respondent.

DAVIS, P. J.:

This case is brought to a hearing upon the return to the *certiorari*. No issue has been taken by the relator upon any of the facts alleged in such return. The court is not, therefore, at liberty to look behind the return for any of the facts of the case.

The return shows that the relator was charged by the captain and sergeant of the twenty-ninth precinct, "with neglect of duty, and conduct unbecoming an officer."

The specifications under this charge were, in substance, that the relator, while on his post, heard the cry of "police," and saw two men fighting in the street, and acting in a disorderly manner, and

failed to arrest said men then, but subsequently did arrest one of the men, but failed to make a complaint against him at the station-house that would warrant his detention by the sergeant in charge.

Second, that on the relator's attention being called by Commissioner Joel B. Erhardt to the two men fighting, he used words unbecoming an officer and gentleman, to wit: "What in hell is it of your business," or words to that effect.

Due personal service of the charges and specifications and of the notice of trial for the 3d of November, 1876, were admitted. On the third of November, the hearing was adjourned to the ninth, and on the ninth it was adjourned again to the sixteenth of November, on which day the hearing was had before Commissioner Erhardt, the charge was read to the relator, and he was sworn. No other testimony was taken, and his statement was laid before a full board of the commissioners, in accordance with rule 131 of the board, regulating the hearing of such charges.

The board found the relator guilty of the charges and ordered his removal. The return states that all the commissioners concurred in the finding and order except Commissioner Erhardt, who did not vote. So far as relates to the first specification, the evidence of the relator himself shows a clear neglect of duty. He saw disorderly persons fighting in the street, and neglected to arrest them; and afterwards, when he arrested one of them upon a charge made by the other that the former had stolen a pistol from him, he neglected to make any charge at the station-house that warranted his detention.

The commissioners thought the excuses made by him were insufficient. We concur in that view, for it was the plain duty of the relator to have arrested the persons guilty of disorderly conduct in the street at once, and to have made proper charges against them. But if we did not concur, nevertheless the evidence was sufficient to call for the judgment of the commissioners, and their conclusions of fact and as to the sufficiency of the excuses are not so wholly unwarranted as to justify our interference.

It was objected that the relator was tried before Commissioner Erhardt, who was himself a witness of the transaction, and to whom the improper language is charged to have been used.

But the commissioner was not called as a witness on the hearing, and he does not appear to have been the complainant, or even to

have instigated the complaint. If he had made the complaint, that act would have been in the line of his duty, and would not necessarily have disqualified him from investigating the charges.

But it appears, in this case, that he only took the testimony of the relator and submitted the same to the full board, and did not vote upon the question of conviction. The trials of this class of cases are summarily conducted without the formalities of courts of law, and it is enough that it appears that the case is one in which the board of commissioners had jurisdiction of the subject-matter of the charges and of the person of the accused, and that *competent* evidence was given which called for the exercise of their judicial functions. (*Haines v. Smith*, 45 N. Y., 776; *People ex rel. Cook v. Board Police*, 39 id., 506; *Mullins v. People*, 24 id., 399.)

The proceedings should be affirmed and the writ dismissed, with costs.

DANIELS, J., concurred.

BRADY, J. (dissenting):

The relator was charged with dereliction of duty. On the day of his trial, and before any witness was sworn, and before any proof was given against him, he was sworn, and asked what he had to say to the charges preferred against him.

Commissioner Erhardt, who would be, and necessarily so, a witness as to one of the charges, presided alone at the trial, and received and reported the evidence to the full board. He did not vote on the final disposition which was made of the case. The relator was asked questions concerning the alleged insubordination in regard to Commissioner Erhardt, and the testimony in reference to that charge, as well as the other, was thus elicited from him. This mode of procedure, I think, is erroneous. The relator was entitled to confront the witnesses against him, and to answer the proofs. Such was not the case. He was sworn, and then asked what he had to say to the charges, which, by such a proceeding were assumed to be true, and to have been substantiated by evidence. This was not the way to establish the charges, and should not be sustained. No charge should be made unless there is evidence to sustain it, and the witnesses should be called to prove it. This is the usual, the best, and,

indeed, the only way in which such trials should be conducted, unless the person charged admits the accusation.

I think, for these reasons, the judgment was improperly pronounced. Commissioner Erhardt could not be both witness and judge for any purpose connected with the charges, although he did not intend to vote on the final disposition of the case. The whole proceeding was, therefore, erroneous, in my judgment, from the time of administering the oath to the relator.

Proceedings affirmed; writ dismissed, with costs.

AARON BARNETT AND JACOB L. PHILLIPS, APPELLANTS,  
v. ABE MEYER AND AARON KOSTER, SURVIVING PARTNERS  
OF HENRY BODENHEIM, DECEASED, RESPONDENTS.

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*Amendment to answer, setting up usury—allowance of—Character of defense not considered.*

In allowing amendments to answers, the court does not now regard the character of the defense sought to be interposed. Accordingly, *held*, that an order allowing an answer to be amended by setting up the defense of usury was properly granted, and should be affirmed.

APPEAL from an order made at Special Term, allowing the defense of usury to be set up by amendment to the answer.

A. R. Dyott, for the appellants.

Samuel Boardman, for the respondents.

BRADY, J.:

The court below allowed an amendment of the answer herein by setting up the defense of usury. The plaintiffs appeal, and the proposition advanced by their counsel is, that the application being to the favor of the court, and to its equitable powers, the application should be denied. He seems to assert that the cases do not allow such a proceeding, where the defense of usury was not originally

interposed. Whatever may have been the earlier doctrine on the subject of what were called unconscionable defenses, it no longer prevails.

The rules which govern amendments are now to be regarded without reference to the character of the defense. None of the cases cited on behalf of the plaintiffs declare that such an amendment should not be allowed. In the case of *Gasper v. Adams* (24 Barb., 287), the application to amend was made after the trial before a referee, and a report made in favor of the plaintiffs, and was for a variance between the proof and the defense of usury set up; and the court thought, among other views expressed, that the section of the Code under which the application was made was designed to sustain, not to reverse, judgments.

The case does not decide the point under consideration, but is mentioned because it is the only one bearing indirectly upon the subject of this appeal. On the other side of the question we do find authority. In the case of the *Bank of Kinderhook v. Gifford* (40 Barb., 659), a default was set aside and the defendant allowed to answer, although the defense sought to be set up was that the note sued on was given for money won at play.

Judge PECKHAM, declaring the earlier rule as to what were termed unconscionable defenses, said the weight of authority was now the other way, holding that on opening a default, properly excused, the court will not impose as a condition that the defendant shall not set up, as a defense, usury or the statute of limitations.

He expresses the opinion that the principle of the earlier decisions was wrong, and gives cogent reasons for the opinion. In *McQueen v. Babcock* (3 Keyes, 428), it was held that the defendant had the right, within the twenty days after service of the original, to amend the answer by setting up the defense of usury. The suggestion is made that all legal defenses stand upon the same footing.

In the case of *Union National Bank of Troy v. Bassett*, decided by the Supreme Court of the third district, at a General Term, which was composed of Justices PECKHAM, MILLER and HOGEBOOM (see 3 Abb. Pr. [N. S.], 359), the precise question was considered and passed upon.

The defendant was allowed to amend his answer so as to set up this defense of usury, and the order was sustained on appeal. The

FIRST DEPARTMENT, MARCH TERM, 1877.

subject is fully discussed, and the conclusion arrived at is in conformity with the Code and the authorities bearing upon the question.

The order made at Special Term should therefore be affirmed, with ten dollars costs and the disbursements of this appeal.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

ABRAHAM S. HERMAN, RESPONDENT, v. HERMAN LYONS,  
APPELLANT.

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*Offer of judgment—trial of action before expiration of ten days—Costs—Code, § 885.*

After issue had been joined in this action, and on the seventh of February, an offer to allow judgment to be taken against him was served by the defendant; on the ninth of February the cause was regularly called in its order on the calendar, an inquest taken therein, and the costs accruing subsequent to the offer taxed in plaintiff's favor. *Held*, that, as ten days had not elapsed from the service of the offer of judgment to the time of trial, the plaintiff was entitled to disregard the offer and to tax the costs thereafter accruing.

APPEAL from an order confirming an adjustment of costs by the clerk of the court.

\_\_\_\_\_, for the appellant.

*Simon H. Stern*, for the respondent.

BRADY, J.:

The defendant served an offer to allow a judgment to be taken against him. The service was made on the seventh February last. On the ninth the cause was regularly called in its order and an inquest taken, and the costs which accrued subsequent to the offer were taxed in plaintiff's favor. If the offer served stayed the plaintiff's proceedings, or imposed any obligation upon him to act in reference to it at once, it might be said that he was not entitled to any indemnity for such subsequent proceedings. He owed no duty to the defendant, however, under the three hundred and eighty-fifth section of the Code; the plaintiff has, in all such cases, ten days to elect whether he will accept the offer or proceed to trial;

FIRST DEPARTMENT, MARCH TERM, 1877.

and if the offer be served so late that the cause is reached and tried before the expiration of the ten days, the offer is unavailable to the defendant. (*Pomeroy v. Hulin, etc.*, 7 How. Pr. R., 161; *Walker v. Johnson*, 8 id., 240; *Lunker v. Richmagel* [decided in this court February 25, 1859].) The plaintiff herein, not having the ten days prior to the call of the cause in its regular order, was not obliged to pay any attention whatever to the offer. He could treat it as a nullity, which he did do, and proceed with his action.

If the rule were otherwise, the service of an offer made when the cause was on the day calendar would prevent the plaintiff from proceeding to judgment, and might compel him to lose the term. The adjustment and the order confirming it were right, and the appeal is of no benefit to the defendant.

Order appealed from affirmed, with ten dollars costs and the disbursements of the appeal.

DANIELS, J., concurred. DAVIS, P. J., not sitting.

Order affirmed, with ten dollars costs and disbursements.

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IN THE MATTER OF THE HEBREW BENEVOLENT AND ORPHAN ASYLUM OF THE CITY OF NEW YORK, TO VACATE AN ASSESSMENT, ETC.\*

*Assessments in city of New York—valuation by ward assessors—§ 7, chap. 326 of 1840—Irregularity in levying assessment—corrected under § 27, chap. 383, 1870.*

It is a sufficient compliance with the requirements of section 7 of chapter 326 of 1840—providing that the commissioners or assessors for making estimates and assessments for any improvements in the city of New York, authorized by law to be assessed upon the owners and occupants of houses and lots shall, in no case, assess any house or lot for more than one-half the value of the same, as valued by the ward assessors in which the same is situated—that such house or lot has been valued by the ward assessors at any time previous to the imposition of the assessment.

\* Three other cases, *The Matter of the Second Baptist Church of Harlem*, *The Matter of the Central Presbyterian Church*, and *The Matter of Congregation of Sheari Zedek*, were all decided at the same term upon the principle laid down in this case. — [REP.]



FIRST DEPARTMENT, MARCH TERM, 1877.

Accordingly, *held*, that where the property of the petitioners had been valued by the ward assessors in the years 1854, 1855 and 1856, an assessment might be imposed thereon in the year 1869, though no valuation had been placed thereon after 1856.

*Second Avenue Methodist Church* (Court of Appeals, MS.) distinguished.

An assessment, exceeding in amount one-half of the value placed upon the property by the ward assessors, is irregular only, and may be corrected under section 27 of chapter 383 of 1870.

APPEAL from an order made at the Special Term, denying a motion to vacate certain assessments imposed upon the property of

The following case, involving the same question, was decided at this term:

IN THE MATTER OF THE PETITION OF ST. JOSEPH'S ASYLUM TO VACATE  
ASSESSMENT.

APPEAL from an order made at Special Term denying a motion to vacate an assessment.

The petitioner, to maintain the issues on its part, introduced in evidence four assessment lists, by which assessment lists it appeared that an assessment was in each case imposed upon lots belonging to the petitioner.

The petitioner proved the ownership of the premises assessed, at and prior to the date of the confirmation of said assessments, and ever since.

That the value of said premises, as valued by the ward assessors in the years 1874, 1873, 1864 and 1863, was \$0.

The counsel to the corporation introduced the following proof, to which the petitioner duly objected and excepted:

Extract from the records of taxes and assessments, for the year 1858, showing the last assessed valuation of the lots of petitioner, to wit, for the year 1858.

It thereby appeared in proof that the several assessments numbered one, three and four did not exceed one-half the value of the lots as valued by the ward assessors in the year 1858. It also appeared that assessment number two did exceed one-half of such valuation.

Petitioner requested the judge by whom the proceeding was heard to order that the several assessments be vacated, which request was refused and petitioner excepted. The judge decided that assessment number two be reduced to one-half of the value of the lots as valued by the ward assessors in 1858.

Petitioner requested the judge to order that upon the assessment as reduced, interest should run only from the date of the order reducing the same, which request was refused and petitioner duly excepted.

*Charles E. Miller*, for the appellant.

*J. A. Beall*, for the respondent.

DAVIS, P. J.:

*In re The Church of St. Michael*, which involved the same questions as in this case, *BARRETT, J.*, at Special Term, pronounced the following opinion:

HUN—VOL. X. 15

the petitioners. The assessments were imposed in 1869, 1870, 1872 and 1874.

The petitioners acquired title to the property upon which the assessment was imposed, seventeen lots, in the year 1860, and erected thereon a building used as a house of industry. The property was never valued by the ward commissioners as required by section 7 of chapter 326 of 1840, after its acquisition by the petitioners.

"BARRETT, J. In *The Second Ave. M. E. Church Case*, the city claimed that it did not appear 'that there was not a valuation for the term of five years before the trial.' But, said the Court of Appeals, 'it was not proven that there was.' It is apparent that the case proceeded upon the tacit assumption that *there had never been a valuation* put upon the lots by the ward assessors or by their successors.'

"This may be said to have been an intimation that if the city *had proved* a prior valuation, the result would have been different. Here this is proved, and thus partial justice, at least, may be done.

"It is urged that the legislature meant to limit assessments to one-half the valuation put upon lands by the ward assessors *in the year in which the local assessment is laid*. This may well have been the intent with respect to lands subject to general taxation, and which it is the duty of the ward assessors annually to value. It could scarcely have been the intent, however, with respect to church property not subject to a taxation, for the duty of making a valuation *in the year in which the assessment is laid* is not imposed upon the ward assessors.

"The legislature has not expressly exempted church property from assessment for local improvements, and it cannot be that it intended to effect such exemption in this obscure and indirect manner.

"It is more reasonable to assume a legislative intent to impose even a different (and probably reduced) rate of assessment on church property from that imposed upon adjoining property, than an intent in this roundabout way to impose no rate at all. The word 'reduced' is used advisedly because the old valuations for lands now used for church purposes are very generally *much* less than could now be fairly made, especially in view of the addition of church edifices.

"In the present case the city has proved a valuation by the ward assessors at a time when it was their duty to make such valuation. It is not pretended that such valuation is unjust, or that the property has since depreciated.

"The assessment must, therefore, be reduced in conformity to the proof, and as reduced sustained."

We think this opinion disposes of the several questions in this case correctly.

It was held by the Court of Appeals, in *The Matter of the Sec. Ave. M. E. Church*, that under section 7 of chapter 326 of the Laws of 1840, lands could not be assessed for local improvement unless they had been previously assessed for the purposes of general taxation by the assessors of the ward in which they are situated. It is understood that that court has since held that by a subsequent statute such lands are subject to assessment for local improvement. We think,

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FIRST DEPARTMENT, MARCH TERM, 1877.

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It appeared upon the hearing that thirty-six lots, including those of the petitioner, were valued by the ward commissioners in the years 1854, 1855 and 1856. The total valuation of the petitioners' lots, in the latter year, was \$4,839.90.

One of the assessments was for making a sewer in Seventy-seventh street, and amounted to \$3,472.60.

The petitioners claimed that the assessments were invalid, because the lots had not been valued by the ward commissioners at the time the assessments were imposed; and that, even if the prior valuation was a sufficient compliance with the statute, the assessment for the sewer in Seventy-seventh street was invalid, because it exceeded one-half of such valuation.

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however, that under the former of these decisions this case was rightly decided. The last assessed valuation of the lands in question was produced. That was made by the ward assessors in the year 1858. In respect of a part of the assessment, the amount imposed did not exceed one-half of said valuation. In respect of other parts, it appeared that the amounts imposed did exceed one-half; but the court below reduced the assessment in those cases to an amount equal to one-half of the assessment of 1858. It cannot, in our judgment, be presumed that by section 7 of chapter 326 of the Laws of 1840 it was the intention to impose upon other lands benefited by a local improvement all the burden of such improvement, where such benefits were shared equally by lands which could not be assessed for general taxation. The intention was to fix a limit beyond which assessments for local improvements should not be extended upon the premises benefited thereby. That limit is expressed by the section as one-half of the value of such house, lot, improved or unimproved land, as valued by the assessors of the ward in which the same shall be situated. There is nothing in the section to require that such valuation by the assessors shall be made in the same year with the assessment for improvements or at any other particular time. It is enough if such valuation has been made by the assessors at any time when they had lawful power to act upon the subject. The fact that they had made such valuation was proved in this case, and the other fact that since that time, by change of ownership and occupancy, the lands had become legally exempt from general taxation, and so had not been valued for that purpose, does not at all change or affect the force of the valuation made when they were subject to general taxation. The court disposed of the question without any conflict with the decision in *The Matter of the M. E. Church* and in accordance with the right and justice of the case.

For that reason the order of the court below should be affirmed, with ten dollars costs and disbursements.

DANIELS and BRADY, JJ., concurred.

*Irving Ward*, for the appellants.

*I. A. Beall*, for the city.

BRADY, J. :

The petitioners claim that there never was any valuation placed upon the property which they own, and that their case falls directly within the decision made by the Court of Appeals in *The Matter of the Second Avenue Methodist Church*, decided in June, 1876, and which went up from this court. They also claim that the assessment for the sewer in Seventy-seventh street should be vacated, as it is based upon an estimate exceeding one-half of the valuation of the property assessed, as shown by the corporation, and inasmuch as the court has no power to order a reduction of the amount unless authorized by the charter of 1870, which is denied.

The first premise is unfounded, because the facts do not warrant it. There had been an assessed valuation of the property prior to the imposition of the assessments, namely, in 1854, 1855 and 1856, and this fact, it was determined by the court below, removed it from the operation of the decision made in the Court of Appeals. This view seems to be correct. The court said in that case: "It is apparent that the case proceeded upon the tacit assumption, that there had never been a valuation put upon the lots by the ward assessors or their successors." And again: "The authority to the city, in the purview of the proviso, is no more than to assess for local improvements all property benefited thereby, when that property has been previously valued by the general tax assessing officers." The proof was made, therefore, by the city of a previous and duly assessed value by the proper officers, which furnished the link which was omitted in the case of the Second Avenue Methodist Church, and makes the assessments valid.

In reference to the assessment for a sewer in Seventy-seventh street, it seems to be conceded that the impost was based upon an erroneous valuation of the property, being in excess of one-half of its assessed value. This does not render it necessary to vacate the assessment. There can be no doubt that it may be reduced under the provisions of the charter of 1870. (Laws 1870, page 903, chap. 383, § 27.) There is nothing, in the judgment of the Court of

Appeals, in the Second avenue case affecting this question. The lack of authority to impose an assessment, which was declared in that case, is given here by the proof suggested, and hence the assessment in excess is an irregularity only.

The order should be affirmed, therefore, except as to the assessment for the sewer in Seventy-seventh street, and as to that it should be reduced to the proper sum.

Ordered accordingly, without costs to either party on this appeal.

DAVIS, P. J., and DANIELS, J, concurred.

Order affirmed, except as to the assessment for the sewer in Seventy-seventh street, and as to that reduced to the proper sum, without costs to either party.

THE WASHINGTON LIFE INSURANCE COMPANY,  
RESPONDENT, v. JACOB FLEISCHAUER AND OTHERS, APPEL-  
LANTS.

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*Foreclosure suit—appointment of receiver in, on application of subsequent incumbrancer—who entitled to amount collected.*

Where, in an action brought to foreclose a mortgage, a subsequent incumbrancer, who is made a party defendant thereto, applies, in his own behalf for, and secures the appointment of a receiver of the rents and profits of the mortgaged premises, he is entitled to retain the amount collected by the receiver as against the claim of a prior mortgagee whose debt the amount realized upon the sale of the mortgaged property, under the judgment entered in the action, has been insufficient to satisfy.

APPEAL by defendants Bernard Amend and Joseph Koelble, executors of Joseph Mosbach, from an order denying a motion to modify an order appointing a receiver.

The plaintiff, holding a first mortgage on certain premises on the 21st of March, 1876, filed a complaint for foreclosure and sale, making the holders of the second, third and fourth mortgages parties defendant.

All the parties were served with the summons in the action without a complaint. After the defendants Amend and Koelble, the holders of the second mortgage, had been served with the summons,

but before they appeared in the action and before their time for appearing had expired, and on the 31st of March, 1876, the defendant Susman Schuster, the holder of the fourth mortgage on the premises, without notice to said Amend and Koelble, moved for a receiver of the rents of the mortgaged premises for his benefit. The motion was granted, the order reciting that it had been made on notice to all parties who had appeared in the action. The mortgaged premises were sold under the decree in the action on the 12th of July, 1876, and after the sale a motion was made on behalf of the said Amend and Koelble, the holders of said second mortgage, to modify the order appointing the receiver by striking out the words "for the benefit of" the fourth mortgagee, and that the rents in the hands of the receiver be paid over to them as holders of the second mortgage, their lien being prior to the lien of the fourth mortgage, and they not having had notice of the application for the receiver for Schuster's benefit.

*B. M. Stillwell*, for the appellants.

*John S. Ray*, for the respondent.

DANIELS, J.:

This action was brought to foreclose a mortgage, which was the first incumbrance on the premises described in it. Three other mortgages were afterwards given upon the same property, and the parties holding them were made defendants in this action. During its pendency the defendant Susman Schuster procured the appointment of a receiver of the rents of the mortgaged premises, for the benefit of himself, the defendants appealing having not then appeared in the action; they had no notice of that application. The receiver collected about \$420, rents of the premises, by virtue of his appointment, and after that and a sale of the premises had been made under the judgment recovered, the appealing defendants, who owned the second mortgage, applied for such a modification of the order as would entitle them to the rents collected by the receiver, the proceeds of the sale paying only the first mortgage upon the property. This application was denied, and the appeal has been taken from the order made upon that denial. The respondent,

defendant, applied for the receiver in his own behalf solely and not generally in the action. That he had the right to do, and the parties holding earlier incumbrances upon the property could have done the same at any time during the pendency of the action, and that would, from the time of favorable action as to either of them, have suspended the special clause of the order made in favor of the defendant who procured it. But, as long as they failed to take any proceeding to secure the collection of the rents for themselves, they were not in a situation to complain of those of the respondent. If it had not been for his application and the order made upon it, the owner of the equity of redemption would, by their practical assent, have himself received and appropriated the rents and profits of the premises during the pendency of the action. He has intervened and prevented that, not for them, but exclusively for himself, and it would be inequitable now to allow him to be deprived of the advantage which his diligence alone has secured. Ordinarily, it is true that a receiver is appointed for the benefit of all the parties in the action. But that is only so when all are interested and have the probable right to participate in the subject of the litigation. That in this case did not directly include the rents and profits of the property while the suit should be pending. They could be impounded only because the property itself was an inadequate security for the debt, and then only by means of a special application of the court for that purpose. The parties each had their election whether that should be made or not. They all elected not to make it, except the respondent. The rest were satisfied to leave the rents and profits out of the case, and unaffected by its determination. He alone was actuated by a different disposition, and moved for their sequestration, as he had a right to, for his own exclusive benefit. After that had been done, and the anticipated benefit had been secured, the appellants could not justly deprive him of its fruits.

The case is within the principle applied in the decision of *Howell v. Ripley* (10 Paige, 43), where the contest concerning the rents was between the complainants in two separate actions of foreclosure, and it was held that the junior incumbrancer could not be divested of his right to the rents and profits in favor of the party holding the first mortgage, until he had procured the appointment of a receiver, who should collect them for his benefit and subordinate to

his own superior rights. In principle, there can be no difference between this case and that which was then decided by the chancellor. The same principle was maintained in *Post v. Dorr* (4 Edw. Ch. [m. p.], 412), where it was held "to be an established rule that a second or third mortgagee, who succeeds in getting a receiver appointed, becomes thereby entitled to the rents collected during the appointment, although a prior mortgagee steps in and obtains a receivership in his behalf, and fails to obtain enough out of the property to pay his debt. This is on the principle that a mortgagee acquires a specific lien upon the rents by obtaining the appointment of a receiver of them, and if he be a second or third incumbrancer, the court will give him the benefit of his superior diligence over his senior in respect to the rents which accrued during the time that the elder mortgagee took no measures to have the receivership extended to his suit and for his benefit." (Id., 414.)

The order appealed from was a proper one, and it should be affirmed, with ten dollars costs, besides disbursements to the respondent.

BRADY, J., concurred.

Present — DAVIS, P. J., BRADY and DANIELS, JJ.

Order affirmed, with ten dollars costs and disbursements.

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WILLIAM SUTPHEN, APPELLANT, v. SIMON A. LASH,  
RESPONDENT.

*Discontinuance of action — Trial fee — Costs — when judgment may be entered for, on order discontinuing the action — Practice, when action is discontinued.*

After an action had been noticed for trial and placed upon the calendar, and just as it was about to be moved for trial, an order was entered discontinuing the action upon payment of costs. *Held*, that the defendant was not entitled to include a trial fee in such costs.

Where an order is entered discontinuing an action on payment of costs, the defendant may, so long as the costs are unpaid, enter judgment therefor and issue execution thereon, or he may disregard the order and proceed with the action as though it had never been entered.



APPEALS from an order made at the Special Term denying a motion to set aside a judgment, and from an order denying a motion for a readjustment of costs.

This action was begun in 1870. On the 15th of February, 1876, the cause was called in its order on the calendar, and, the plaintiff not answering, the defendant's attorney dismissed the complaint. The defendant's costs were thereupon taxed, and a judgment therefor entered in favor of defendant and against plaintiff. Upon the payment, by the plaintiff, of the sum of twenty-five dollars, this judgment was vacated by consent on the seventeenth of March, and the cause set down for the April term. While the cause stood in this condition on the April calendar, awaiting trial, the defendant's attorney was served with a stay of proceedings, embodied in an order to show cause why plaintiff should not have leave to discontinue the action without payment of costs, returnable April seventeenth. The cause in the meantime being reached on the calendar, it was directed by the Circuit Court, upon these facts, that it stand till the eighteenth of April, in order that this motion might first be disposed of. The motion was denied. Thereupon the plaintiff procured an order, April twenty-ninth, that the cause be discontinued on payment of costs to be taxed.

The costs, including a trial fee, were taxed on the fifth of May, and, not having been paid, the defendant, on the twenty-fifth of May, entered judgment therefor.

*William Sutphen*, in person, and *Daniel W. Gillett*, for the appellant. The judgment was irregular. Plaintiff had a right to enter the order allowing a discontinuance upon payment of costs, and it is well settled that the defendant cannot, under such an order of discontinuance, enter up a judgment for his costs. (*Leonard v. Slaughter*, 10 John. R., 376 [1813]; *Huntington et al. v. Forkson*, 7 Hill, 195 [1845]; *Wightman v. Shankland*, 18 How. Pr., 79 [1859]; *Hicks v. Brennan*, 10 Abb. Pr., 304 [1860].) The costs, as taxed, are in their nature interlocutory, and therefore cannot be collected by a judgment. (*Brown v. Leigh*, 50 N. Y., 427; *Wilkin et al v. Raplee*, 52 id., 248.)

*F. C. Bowman*, for the respondent.

DANIELS, J.:

On the adjustment of the costs, the plaintiff objected that a trial fee should not be included in the amount. But, as it appeared that the complaint was dismissed on proof of service of a notice of trial at the circuit, that objection was properly overruled. (*Dodd v. Curry*, 4 How., 123; *Tillsbaugh v. Dick*, 8 id., 33; *Shannon v. Brower*, 2 Abb., 377.) But after the default was taken it was set aside by consent for the sum of twenty-five dollars, paid by the plaintiff to the defendant's attorney. And as the costs and disbursements to which the defendant was entitled in the action were all included in the bill as it was adjusted, this sum should have been deducted from its aggregate amount. It was evidently a payment of so much in the way of costs, recoverable as a consequence of the default; and the plaintiff was entitled to derive that benefit from it.

The amount was less than the costs and disbursements attending the default; but the plaintiff was none the less entitled to the benefit of it because of that circumstance.

The cause was afterwards noticed and placed upon the calendar for trial, and, as it was about to be moved, the proceedings were stayed for a motion to be made for leave to discontinue without costs. That was denied, and an order entered discontinuing the action on payment of costs. The defendant claimed that this entitled him to another trial fee, within the cases of *Pomeroy v. Hulín* (7 How., 161), and *Jones v. Case* (38 id., 349); but neither of them, nor the other authority referred to, proceeds far enough to support that position. As the costs were not paid pursuant to the order, the action might have been again dismissed, which would have entitled the defendant to another trial fee; but, as it stood when the bill of costs was adjusted, that could not properly be allowed. The defendant was, then, entitled to but one trial fee, and from the amount of the bill the twenty-five dollars should have been deducted.

After the costs were adjusted the defendant entered a judgment in the action for their recovery. The plaintiff moved to set that aside as irregular, assigning as a reason in support of the motion, that a judgment cannot be entered on an order of discontinuance. The defendant, it is well settled, had the right to treat the order as a nullity without payment of the costs after their adjustment. He

could have proceeded in the action and dismissed the complaint, and then entered judgment for the recovery of his costs. But while he could take that course, he was not bound to do so. He had the power to waive that right, and regard the discontinuance as a termination of the action and enter a judgment for his costs upon it accordingly. This practice was allowed by the statute before the Code. (3 R. S. [5th ed.], 908, §§ 1, 4.) And it was followed by the courts. (1 Burrill's Pr., 179, 383, 418.) The defendant had his election whether he would enter judgment and issue execution for the collection of his costs, where they remained unpaid, or disregard the order entirely and proceed with the action the same as though the discontinuance had not been ordered. And that has not been abrogated by the Code, because it is not inconsistent with any of its provisions. It is only where a preceding statute proves inconsistent with the Code that it has been repealed by that system. (§ 468.) Beyond that, the preceding rules and practice have been retained when they are found consistent with the changes made by the Code. (§ 469.) And the right to enter judgment for the collection of costs upon a discontinuance appears to have been in that manner preserved. This, in substance, was the view of the practice which was taken in *Crockett v. Smith* (14 Abb., 62), and *Pacific Mail Co. v. Leuling* (7 Abb. [N. S.], 37-41).

The plaintiff has cited many cases which were supposed to conflict with the existence of this right, but the most that can be deduced from them has already been stated. The order of discontinuance, without the actual payment of costs, is a nullity as to the defendant, if he elects so to regard it; but he is under no obligation to the other party to so consider it. He may elect to regard it as an effectual termination of the action, and enter judgment for the recovery of his costs, as the defendant did in this instance.

The order denying the motion for readjustment of the costs should be reversed with the usual costs and disbursements to the appellant, and a readjustment ordered, unless the defendant, within twenty days after notice of this decision, stipulate to deduct twenty-five dollars from the amount recovered as the judgment now stands. If such a stipulation be given, then the order, as so modified, will be affirmed, without costs.

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FIRST DEPARTMENT, MARCH TERM, 1877.

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The order denying the motion to set aside the judgment should be affirmed, with ten dollars costs besides the disbursements.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed denying motion to set aside judgment with costs, etc. Order denying motion for readjustment of costs reversed, unless, etc., as stated in the opinion. Order to be settled.

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MARY A. SCHANCK, EXECUTRIX, ETC., OF DANIEL S. SCHANCK, DECEASED, RESPONDENT, v. THE MAYOR, ETC., OF THE CITY OF NEW YORK, APPELLANT.

THE NEW YORK DISPENSARY, RESPONDENT, v. THE SAME.

*Common council of city of New York—power of, to make leases—reasonable rent under—§ 18, chap. 335 of 1873.*

Under section 18 of chapter 335 of 1873, providing that the common council of the city of New York shall have no power to "make a lease of any real estate or franchise, save at a reasonable rent;" the decision of the question as to whether or not the rent reserved is a reasonable one is left to the discretion of the common council, and, in the absence of fraud or collusion, its decision is conclusive.

APPEALS from judgments in favor of the plaintiffs in the above entitled actions, entered upon the trial thereof by the court without a jury.

The actions were brought to recover the rent accruing upon leases to the city. In both cases the leases were executed in obedience to resolutions, duly adopted by the common council and approved by the mayor, and in both cases the city had been in possession of the demised premises ever since the commencement of the respective terms, and had paid no rent therefor.

The defendant set up, in its answer, that the common council had no power to take or make a lease of any real estate, save at a reasonable rent, "and that the rent alleged in said complaint to be reserved

by the lease therein set forth is not a reasonable rent of the premises therein described, but is, on the contrary, grossly exorbitant."

Upon the trial the defendants offered to prove what was the reasonable rental value of the demised premises, which evidence was, upon the plaintiff's objection thereto, excluded by the court.

*A. J. Requier*, for the appellants.

*A. C. Brown*, for the respondents.

*Per Curiam* :

These appeals were argued together, as they both involve the same question. On the trial the court below pronounced the following opinion :

"LAWRENCE, J. I think that the objection to the evidence offered by the defendants, as to the rental value of the premises, is well taken. Under the eighteenth section of the charter, the common council have, it appears to me, a discretion in determining whether the rent demanded upon the execution of a lease to the city is or is not reasonable, and, in the absence of fraud or collusion, their determination on this point is conclusive.

In this case there is no allegation of fraud or collusion, but it is alleged that the rent is exorbitant. If the construction which is contended for by the learned counsel for the city is correct, every person who executes a lease to the city will be liable, at any time during the term, to be called upon to show, not only that the lease was duly and honestly entered into, and that the common council considered the rent reserved by the lease "a reasonable rent," but that, *in point of fact*, and according to the opinion of experts, such rent *is* reasonable.

Such cannot, I think,<sup>1</sup> be the true construction of the eighteenth section of the charter. By that section, the common council are prohibited from making a lease, etc., "save at a reasonable rent." If they are guilty of fraud or of collusion with the lessor, such fraud or collusion would be a defense; but an error on their part as to the reasonableness of the rent, not alleged to have been willfully committed, in my opinion, cannot be urged as a defense. The true rule applicable to this case seems to be that stated in the case of *The*

*New York and Harlem Railroad Company v. The Mayor of New York* (1 Hilton, 562-588): "Courts are bound to assume that where a discretion is vested in a municipal body, exercising functions of a legislative character, good reasons existed for the adoption of a regulation or ordinance which was the result of such a discretion."

If, from the amount of the rent reserved, the city authorities have reason to believe that these leases were fraudulently procured, or are the result of a collusion or conspiracy, the fraud should have been alleged, and the answers may now be amended in that respect, on a proper application at the chambers of the court, if the defendant shall be advised that the facts justify them in making such an application. The objection to the evidence, as the pleadings now stand, must be sustained."

The city charter recognized the authority to take leases of real estate for the uses of the city, or its departments. As one of the powers of the common council, a limitation is imposed upon the exercise of this power by section 18 of chapter 335 of the Laws of 1873, which is in these words:

"The common council shall have no power to impose taxes or assessments, or borrow money or contract debts, or loan the credit of the city, or take or make a lease of any real estate or franchise, save at a reasonable rent, and for a period not exceeding five years, unless specially authorized so to do by act of the legislature."

By section 14 of the same act, it is required that three-fourths of all the members of the common council must concur in the resolution to lease real estate.

Section 16 provides that no resolution of the common council for the appropriation and expenditure of public moneys, or authorizing the incurring of any expense, shall be passed or adopted until at least five days after an abstract of its provisions shall have been published in the City Record, and that no such resolution shall be approved by the mayor until three days after such abstract shall have been published after its passage.

These safeguards are thrown around the exercise of the power to take leases of real estate, and were intended to secure careful deliberation and the concurrence of three-fourths of the common council, in the consideration of the various questions touching the propriety

of making such leases, amongst which is, of course, the reasonableness of the rent. The mayor and common council are thereby, of necessity, in the exercise of their sound discretion, made judges whether the rent to be paid is a reasonable one, and it was not the intention of section 18, above quoted, to subject that question to trial by a court and jury, unless fraud and collusion be alleged. The restriction imposed by the eighteenth section is intended to be an interdiction of an act, the doing of which subjects the common council, or such of its members as are guilty of the wrong, to punishment for a criminal offense, and though as to some of the acts interdicted the action of the common council will be void, because no discretion is permitted, yet, where discretion is necessarily involved, another rule must apply, and the question of validity must depend upon the presence or absence of fraud or collusion. The question of "reasonable rent" in any lease taken for a term within the limited period of five years, is necessarily one of the latter class, and to overthrow such a lease, fraud or collusion must be averred and proven. Under such an averment, the question whether the rent to be paid is exorbitant or not is, of course, one element of proof, and it is easy to imagine a case where the amount of the rent alone might be strong and satisfactory proof of the allegation of fraud and collusion. In these cases, the answers aver in substance, only that the rent reserved in the leases is not a reasonable, but is an exorbitant one, and the offer at the trial was, in substance, to submit the mere question of reasonableness to the jury. The court excluded that evidence, for the reasons assigned in the opinion of LAWRENCE, J.

We concur in his opinion, and order that the judgments be affirmed.

Present — DAVIS, P. J., BRADY and DANIELS, JJ.

Judgments affirmed.

JOSEPH PARK, JR., JOHN M. TILFORD AND CHARLES PARK, APPELLANTS, RESPONDENTS, v. ALEXANDER SPAULDING AND WILLIAM L. SIMMONS, IMPLEADED, ETC., APPELLANTS AND RESPONDENTS.

JOSEPH PARK, JR., JOHN M. TILFORD AND CHARLES PARK, APPELLANTS AND RESPONDENTS, v. ZACHARIAH E. SIMMONS AND J. H. ADAMS, IMPLEADED, ETC., APPELLANTS AND RESPONDENTS.

*Code, § 806 — when one of several defendants entitled to costs — Clubs — liability of members of — how terminated.*

Where, in an action brought against several defendants, the plaintiff succeeds as to some and fails as to the others, the successful defendants are only entitled to costs when,

- (1) They are not united in interest with those against whom the plaintiff recovers;
- (2) They have interposed a separate defense by a separate answer; and when
- (3) Costs are awarded to them by the court.

*Allis v. Wheeler* (56 N. Y., 50) followed.

Where a body of gentlemen join themselves together for social and recreative purposes, and assume a name under which they incur liabilities, the members thereof become jointly liable for any indebtedness thus incurred, and each member continues liable so long as he remains a member of such body, and until he notifies the creditors thereof of his withdrawal therefrom.

APPEAL by the defendants Spaulding and W. L. Simmons from so much of a judgment entered upon the report of a referee, as directs judgment against them for \$1,050.12, and appeal by the plaintiffs from so much of said judgment as awards costs to the defendants Z. E. Simmons and J. H. Adams.

From the report of the referee, it appears that early in the month of April, 1871, a number of gentlemen met together and agreed to form an association for social purposes, to be called and known as the Worth Club, the defendant William L. Simmons being one of such persons.

That such persons, and those who afterward joined them, procured a building on Twenty-seventh street, in the city of New York, went into the possession thereof before the 21st of April, 1871, and kept the same open as a club-house till after January 5, 1873.



That such club was not incorporated, had no constitution or by-laws, but its object and purpose was to provide a club-house at which the members could meet together for conversation, social intercourse, and there obtain such refreshments, wines, liquors and cigars, etc., as they might, while there, desire; and such object and purpose was carried out from the time of the organization of the club till after January 5, 1873.

That, at a meeting of the members of said club, held on the 21st day of April, 1871, Thomas B. Whitney and Thomas L. Banker, two of the members of such club, were appointed a committee to purchase a stock of wines, liquors and cigars, for the use of said club and the members thereof, and, in pursuance of such appointment, such committee called upon and applied to the plaintiffs to sell a bill of goods to the Worth Club.

That said plaintiffs then inquired if the Worth Club was incorporated, and were informed that it was not. They then asked who were members of it, and a number of the members being mentioned, among those named being the defendant W. L. Simmons, the plaintiffs stated that they knew some of the members, and deemed them responsible, and, at the same time, the said Whitney stated to the said plaintiffs that he, personally, would guarantee the payment of the bill of goods which he desired to purchase, but nothing bought after that, and that Park & Tilford could ascertain as to their (the club's) responsibility.

That about the time of such purchase, or very shortly thereafter, Richard M. Darling became the steward of the Worth Club, and acted as such till after January 5, 1873, and until such club ceased to exist as an organization.

That about two months after the delivery to said club of the goods so purchased of Park & Tilford by said Whitney and Banker, an arrangement was made by said Richard M. Darling with the members of the Worth Club, generally, in and by which said Darling promised and agreed that he, personally, and on his own credit, would buy and pay for all necessary supplies for said club, and the members thereof, and that he would dispose of the same to the members thereof as they should desire, and look to the individual members for payment of the same, and that he would

not contract any debt on the credit of said club, which arrangement was generally known to the members of the club.

That Park & Tilford never were informed of this arrangement or of the agreement of said Darling with the members of the club, nor did the members of the club know that Darling continued to buy supplies of Park & Tilford on the credit of the club, nor did they make any inquiry of Park & Tilford on the subject.

That, in the spring of 1872, the defendant Alexander Spaulding joined the club and continued a member thereof while it lasted.

The defendant Zachariah E. Simmons joined the Worth Club in 1871, and on or before October 1, 1873, he sent a note to the secretary, addressed to the club, resigning his membership or tendering his resignation. He never was informed of any acceptance of his resignation, nor did it appear that his note of resignation was ever received by the club or the secretary thereof. Park & Tilford had no knowledge of Mr. Z. E. Simmons' membership or of his resignation.

The defendant William L. Simmons was a member of said club in the spring of 1871, and Park & Tilford were informed of his membership in the club when the account with them was first opened, but they had no knowledge or information of his withdrawal therefrom.

The defendant J. Howard Adams joined the Worth Club the forepart of May, 1871, and continued his membership about six months, and then sent to the club his resignation as a member, after which he never went to the club-house.

Park & Tilford had no notice or information that the defendant Adams was a member of the club, nor any information of his withdrawal therefrom.

The referee found, as conclusions of law, that the plaintiffs were entitled to judgment against the defendants Alexander Spaulding and William L. Simmons, and that the defendants Zachariah E. Simmons and J. Howard Adams were entitled to judgment in their favor in this action, with costs against said plaintiffs.

*Stephen A. Walker*, for the plaintiffs, as appellants and respondents.

*H. M. Whitehead*, for the defendants, as appellants and respondents.

DAVIS, P. J. :

The appeal of the plaintiffs is from the judgment for costs entered against them by the direction of the referee in favor of the defendants Z. E. Simmons and Adams. These defendants were sued with the defendants W. L. Simmons and Spaulding for an alleged joint cause of action. They did not put in separate answers, but appeared by the same attorneys, and united in the answer with all the other defendants in the action. The referee directed a judgment in their favor for costs, on the ground that the plaintiffs had failed to establish their liability for the cause of action sued upon. In *Allis v. Wheeler* (56 N. Y., 50), the Court of Appeals held that the provision of section 306 of the Code, as amended in 1851, regulates in all actions the whole subject of the allowance of costs to one or more of several defendants, who obtain judgments in his or their favor, while the plaintiff recovers costs against the other defendants, and that the conditions upon which defendants in such cases can have costs against the plaintiff are: 1. That the successful defendant be not united in interest with those against whom the plaintiff recovers. 2. That they make a separate defense by a separate answer; and 3, that the court award costs to the successful defendants. In respect of these defendants but two of these conditions, to wit, the first and third, are met. The second, that they make a separate defense by a separate answer, is not complied with. The effect of this condition is to deprive them of the right to costs. The referee had no power to award costs to them, and the judgment in their favor for costs must therefore be reversed.

The appeal of the defendants Spaulding and Simmons is from the judgment in favor of the plaintiff.

They were members of an unorganized body of gentlemen calling themselves the "Worth Club." This body had no constitution or by-laws, or articles of association. It comprised, however, more than seven members, and it had a president and treasurer at some time, if not all the time, during its continuance.

The appellants claim that this body was a joint-stock company or association, and could only be sued in the name of the president or treasurer under the statute of 1849, chapter 258, and the statute of 1851, chapter 455. If the "Worth Club" were a company or association within the meaning of chapter 455 of the laws of 1851, still

an action might be maintained against the individual members, because the provisions of chapter 153 of the Laws of 1853, which amended the act of 1849 so as to require an action against the joint-stock company or association, and an execution upon judgment to be returned unsatisfied in whole or in part before a suit could be brought against the shareholders of associations individually, do not apply to the cases provided for by chapter 455 of the laws of 1851. But, upon the facts appearing in this case, the "Worth Club," so called, was not a joint-stock company or association within the meaning of the acts referred to. Its members remained at all times in that nebulous and inchoate condition, in which an aggregation of individuals, assuming a name under which they incur liability, are held personally liable for the benefit of creditors by the application of common-law principles. The referee has found a state of facts in this case upon which, we think, the present appellants are personally liable for the indebtedness to the respondent. The appellant, Spaulding, became a member of the club in the first part of December, 1871, and continued his membership as long as the club lasted. The appellant, William L. Simmons, was a member of the club at the time the account was first opened with the plaintiffs in the name of the club. He was one of the committee who made the first purchase of the plaintiffs, and he never notified the plaintiffs at any time of his withdrawal from the club. The goods thus purchased were sent to the club-house, and came into the possession of Richard M. Darling, the steward, who subsequently paid the plaintiffs the amount of that bill. He thereafter continued as such steward to act in making purchases from time to time in the name of the club; and, although a private arrangement existed by which the steward had agreed to make these purchases himself, and to furnish the articles to the members of the club on his own account, yet this arrangement was never communicated to the plaintiffs. Where such a body of gentlemen join themselves together for social intercourse and pleasure, and assume a name under which they commence to incur liabilities, by opening an account, they become jointly liable for any indebtedness thus incurred; and if either of them wishes to avoid his personal responsibility by withdrawal from the body, it is his duty to notify the creditors of such withdrawal; otherwise, if a creditor continues to furnish, in good faith, articles

such as have been previously purchased for the use of the club, his responsibility will continue upon the same principle that holds retiring partners to liability for an indebtedness subsequently contracted with former creditors. These principles have been properly applied, we think, in this case, by the learned referee, and the judgment should be affirmed.

BRADY and DANIELS, JJ., concurred.

Judgment on plaintiffs' appeal reversed.

Judgment on appeal of Alexander Spaulding and William L. Simmons affirmed, with costs.

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HUGH McCULLOCH AND OTHERS, RESPONDENTS, v. ORRIN C. HOFFMAN, IMPLEADED WITH GEORGE J. HOFFMAN, APPELLANT.

*Bill of exchange — want of consideration — when it may be shown — what evidence proper to establish it.*

In an action upon a bill of exchange against the drawer thereof, the latter may defeat the action by showing that there was no consideration therefor; except when it has passed into the hands of a *bona fide* holder for value before maturity.

Where such defense is interposed, the defendant may show all that occurred at the time of the making of the bill, not to limit its effect or change its character, but to establish the absence of any consideration and the knowledge of the plaintiff of that fact.

APPEAL from a judgment in favor of the plaintiff, entered on a verdict directed by the court.

C. W. Brooke, for the appellant.

T. H. Hubbard, for the respondents.

DAVIS, P. J. :

This action is brought upon a bill of exchange in the words and figures following :

FIRST DEPARTMENT, MARCH TERM, 1877.

£585.11.11.

LONDON, *July 11, 1873.*

On demand please pay to the order of Messrs. Jay Cooke, McCulloch & Co. (duplicate unpaid), five hundred and eighty-five pounds eleven shillings and eleven pence, value received, which place to account of

G. J. HOFFMAN.

GEORGE HOFFMAN, Esq.

O. C. HOFFMAN.

*Pres. Irving National Bank, New York.*

The defendant George J. Hoffman interposed no defense. The defendant Orrin C. Hoffman put in an answer admitting his signature to the bill of exchange, and alleging as a defense, in substance, that the bill was given by the defendant George J. Hoffman to the plaintiffs for advances theretofore made by them to George; that after the bill had been made by George it was presented to him by one of the plaintiffs, who represented to him that it had been drawn for advances made to George by the plaintiffs; that the drawee, who was the father of both the defendants, had refused to make pecuniary advances to his son George J. Hoffman, owing to his alleged excesses and improprieties, and would probably not accept the draft, but would be more likely to do so should the defendant Orrin C. Hoffman also sign his name; and that if his father did not accept it, it should never trouble the said Orrin C. Hoffman personally, and that the defendant did so subscribe his name at the request of the plaintiffs, without any consideration whatever, and that the bill of exchange was altogether without consideration in respect to him.

On the trial of the action the plaintiff produced and read in evidence the bill of exchange, and proved, in substance, that the drawing thereof was unauthorized, and that the defendants had no funds in the hands of the drawee against which to draw, and rested.

On the part of the defense it was proved that the bill was given for the balance of an account of George J. Hoffman with the plaintiffs, and was executed by said George J. Hoffman a day or two before it was signed by the defendant Orrin C. Hoffman, and that it had no consideration whatever except the indebtedness of said George J. Hoffman upon the balance of his account.

The defendant's counsel then offered, in various forms, to prove the circumstances connected with the affixing of Orrin C. Hoffman's

signature to the bill, and the giving of it by him, substantially as alleged in his answer to the complaint. This was excluded by the court on the ground that the defendant could not in that way contradict the bill of exchange; and exceptions were taken.

After proving that the bill of exchange was given for the balance of the account of George J. Hoffman, the following question was put to Orrin C. Hoffman: "What connection had you, if any, with that account, in any way?" This question was objected to; the objection was sustained, and an exception duly taken. Amongst other questions, also, the following were put to the defendant Orrin C. Hoffman: "Will you state precisely what occurred and what was said at the time your signature was affixed to that draft, prior to the time and at the time your signature was affixed?" "What was said by Mr. Inleston to you immediately prior to your affixing your signature to this draft, in consequence of which you signed it, if any thing?" "Have you received any consideration for this draft, and were you a party to the transaction referred to in this account, for the balance of which it was given?" "Where did you sign it?" "Was there any agreement made between the payees of that draft and yourself, in accordance with which agreement you signed the draft?" All these questions were objected to; the objections were sustained, and exceptions duly taken. In respect to the question first above quoted, the exception seems to have been well taken. The defendant had the right to show distinctly that he had no connection with that account, although it appeared clearly that the bill was given for the balance of such account of his brother. In respect to the other questions, the evidence seems to have been rejected upon the ground that the agreement sought to be proved was not in writing, and that they were an attempt to contradict by oral evidence the terms of a written instrument.

At the close of the evidence the defendant's counsel asked the court to charge the jury, that if they found as matter of fact that no consideration passed to Orrin C. Hoffman from the plaintiffs in this case, or from the person in whose favor the draft was drawn, that the verdict should be for the defendant Orrin C. Hoffman, and not for the plaintiffs. The court declined so to charge, and the counsel excepted. It is well-established law that a party may always show want of consideration to invalidate a contract. To this rule there

is but a single exception, which is the case of a negotiable promissory note or bill of exchange, which has passed into the hands of a *bona fide* holder for value before maturity. In such a case the want of consideration is no defense; but in every other case a total want of consideration is a perfect defense to an action upon any contract, whether verbal or written, and under our statutes sealed contracts are no exception to the rule.

For the purpose of establishing the defense of want of consideration, set up in the answer of Orrin C. Hoffman, it was competent to prove the facts and circumstances under which his signature was put to the bill of exchange. This action is between the original parties to the instrument. The consideration was, therefore, open to inquiry, and the facts and circumstances, even if they make out an oral agreement, were admissible for the purpose of establishing a total want of consideration. It was not sought thereby to vary the terms of the agreement, except in respect to its statement of a consideration for the making of the paper; but it was sought to be shown that no consideration whatever passed or existed as between the defendant Orrin C. Hoffman and the plaintiff, amounting to a sufficient consideration to uphold the bill.

In *Benton v. Martin* (52 N. Y., 570) it was said: "Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity, and the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between parties to it and others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which delivery is made. And so, also, as between the original parties and others having notice, a want of consideration may be shown."

There is no difficulty in the proper application of this rule, and its restriction to the subject under investigation, to wit, a total want of consideration and what transpired, at the time of making the paper, though it may not have been competent for the purpose of limiting the effect, or changing the character of the instrument itself, was, we think, certainly competent, as between the parties to the



original paper, for the purpose of showing the absence of consideration, and the knowledge of the plaintiff that the paper was made wholly without consideration. We think the court was in error in excluding the several questions, and that such error was not cured by the fact that the evidence sought to be called out by the questions was obviously the same as that stated in the offers of the defendant's counsel, which embraced in part the unwritten agreement that the bill, if not accepted by the drawee, should not be enforced against the defendant.

It is not necessary to pass upon the question arising upon the refusal of the court to charge as requested.

The judgment must be reversed and a new trial ordered, with costs to abide event.

BRADY and DANIELS, JJ., concurred.

Judgment reversed, new trial ordered, costs to abide event.

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JOHN BARNESCIOTTA, OTHERWISE CALLED JOHN GARIBALDI, AND ANNIE SMITH, PLAINTIFFS IN ERROR, v. THE PEOPLE OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

*Indictment — misnomer — Plea in abatement — Demurrer — Nuisance — Disorderly house.*

Upon the arraignment of the plaintiff in error upon an indictment in which he was named "John Barnesciotta, otherwise called Garibaldi," his counsel filed the following plea: "Now comes the defendant Barnesciotta and pleads to the indictment that he is not now, and never was, known by the name of Garibaldi, which he verifies," to which plea the people demurred. *Held*,

- (1) That a demurrer was the proper mode of disposing of the plea;
- (2) That the plea was properly overruled, as the true name preceded the *alias dictus*.

Upon the trial of an indictment for keeping a disorderly house, it is not necessary to show that it was so kept as to disturb the peace of the general public or of the particular neighborhood; it is sufficient if it be shown that it is a house of prostitution, open promiscuously, and to which large numbers of people resort for the purpose of prostitution.

*Jacobowsky v. The People* (8 Hun, 524) followed.

WRIT of error to the Court of General Sessions of the city and county of New York, to review the conviction and sentence of the plaintiffs in error for keeping a disorderly house.

*Wm. F. Kintzing*, for the plaintiffs in error. A house in law to be "disorderly" must be what is termed a common nuisance. It must affect those other than the inmates, and it must be laid in the indictment as a common nuisance. (*Hunter v. Commonwealth*, 2 Serg. & Rawle [Pa.], 298; *State v. Matthews*, 2 Dev. & Bat., 424; *United States v. Jourdine*, 4 Cranch, C. C., 338; *Stewart v. The Commonwealth*, 1 Serg. & Rawle [Pa.], 342; 1 Bishop, Crim. Law, chap. 68, § 1106; 2 Wharton Am. Cr. Law [7th ed.], § 2378; *State v. Baily*, 1 Foster, 343; *Clementine v. State*, 14 Mo., 112; *State v. Stevens*, 40 id., 559; *Hackney v. State*, 8 Ind., 494.) An indictment will not lie for that which is a nuisance only to a few inhabitants of a particular place. (*Rex v. Lloyd*, 4 Espinasse's Rep., 200.) And the act must be, in some sense, public to be a nuisance of the indictable kind. (*State v. Wright*, 6 Jones [N. C. R.], 25; *State v. Hathcock*, 7 Iredell [N. C.], 52; *State v. Evans*, 5 id., 603; *State v. Baldwin*, 1 Dev. & Bat., 195; *Lansing v. Smith*, 8 Cowen, 146; *People v. Sergeant*, 8 id., 139; *Turner v. The Trustees, etc.*, 5 Hill, 121; *Brooks v. The State*, 2 Yerger, 482; *Commonwealth v. Webb*, 5 Randolph, 312.)

*Benj. K. Phelps*, district attorney, for the defendants.

DAVIS, P. J.:

The plaintiffs in error were indicted for keeping a disorderly house. The plaintiff in error John Barnesciotta was named in the indictment by that name, followed by the words, "otherwise called Garibaldi." On being arraigned, his counsel read and filed the following plea:

"Now comes the defendant John Barnesciotta, and pleads to the indictment, that he is not now, and never was, known by the name of Garibaldi, which he verifies.

"JOHN BARNESCIOTTA.

"Sworn this 25th day of }

"September, 1876. }

"WM. F. HOWE,

"Commissioner of Deeds, N. Y."

The district attorney filed a demurrer to said plea, and the said plaintiff in error joined in demurrer. The court overruled the demurrer, and gave judgment thereon for the people. The demurrer was properly overruled. The true name preceded the *alias dictus*, and in such case a plea in abatement will not be sustained. (*Reid v. Lord*, 4 Johns., 118.) It was quite immaterial whether the plaintiff in error was ever known by the name of Garibaldi, and the indictment did not so aver. If his true name be John Barnesciotta, as the plea in abatement must be taken to admit, then the *alias dictus* becomes wholly immaterial, and is not capable of working prejudice to the plaintiff in error.

Besides, the plea was defective in form. It does not aver the true name except argumentatively, and does not aver that he is not indicted by his true name; and it does not meet the averment of the indictment, which is not that the defendant was known by the name of "Garibaldi," but that "John Barnesciotta" was otherwise called "Garibaldi," which may be, and probably was, a nickname by which he was sometimes called by his associates. There is no reason for interference with the conviction or judgment on this ground. The demurrer was a proper mode of disposing of the plea on the record. (*Rex v. Clark alias Jones*, 1 D. & R., 43.)

The indictment was for keeping a disorderly house. Its averments in that respect were well enough. It is insisted, in substance, that the evidence was not sufficient to uphold the indictment, because it did not show that the house was a nuisance in disturbing the peace of the general public, or of the particular neighborhood. But a bawdy house may also be a disorderly house, and it is so whenever it is shown to be a house of prostitution, open promiscuously to the public, and to which large numbers of persons resort for purposes of prostitution. In *Jacobowsky v. The People* (6 Hun, 524), DANIELS, J., said: "For that purpose it would have been sufficient to have shown that the prisoner kept a house of prostitution. Its direct tendency was to corrupt and deprave public morals, and disturb the peace, and for that reason it was a common nuisance. That has uniformly been held to be the law." (1 Whart. Crim. Law, § 2392; 1 Bul. Crim. Law, §§ 665, 1046; 17 Rich, 80, and other cases cited.)

In this case the evidence not only showed that the house was

kept as one of promiscuous prostitution, but for the most vile and indecent exhibitions for money, repeated many times daily, to which large numbers of "strangers" resorted. These exhibitions were of a kind too revolting for description, and nothing can be conceived more debasing or more strongly calculated to deprave and corrupt the public morals.

The learned recorder was right in charging in accordance with the ruling in *Jacobowsky v. The People*; and as that case was affirmed by the Court of Appeals, it must be regarded as the settled law of this State.

There is no rule of evidence which limits the proof to the exact day named in the indictment. It was entirely proper to show that the indecencies and prostitution were continuous and so far affected the large numbers of vile people who resorted there from day to day as to become a nuisance injurious to the whole public morals. The conviction and judgment must be affirmed.

Ordered accordingly.

BRADY and DANIELS, JJ., concurred.

Judgment and conviction affirmed.

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J. DAVIS DUFFIELD AND OTHERS, AS ASSIGNEES, ETC., OF  
CHARLES T. YERKES & CO., APPELLANTS, v. HARRY L.  
HORTON AND DAVIS JOHNSON, RESPONDENTS.

*Bankruptcy proceedings — effect of, on attachment — liability of one paying over money to sheriff under.*

An assignment to an assignee, duly appointed, in proceedings under the bankrupt act, dissolves the lien of an attachment issued out of a State court, where the property of the bankrupt has been levied upon within four months of the commencement of such proceedings.

Where, in such a case, the person owing to the bankrupt the money levied upon under the attachment delivers the same to the sheriff upon an execution issued upon a judgment recovered in said action, not knowing that an assignee in

FIRST DEPARTMENT, MARCH TERM, 1877.

bankruptcy had been appointed after the attachment and before the judgment, he is liable to such assignee for the value of the property so delivered.

*Miller v. Bulles* (58 N. Y., 253) followed.

APPEAL from a judgment in favor of the defendants, entered upon the trial of this action by the court, without a jury.

*Sidney S. Harris*, for the appellants. The filing of the petition in bankruptcy, followed by the adjudication of Yerkes as a bankrupt, dissolved the attachment issued in the suit of *Bouvier v. Yerkes*. (Bankrupt Act, 1867, § 14; *Miller v. Bowles*, 58 N. Y., 263; *In re Preston*, 6 Bankruptcy Reg., 545.) Bouvier had no lien at the time he recovered judgment, and acquired none by the recovery of the judgment or the issuing of the execution. (*In re Hinds*, 3 Bank. Reg., 92; *Edmeston v. Lyde*, 1 Paige, 637; *Corning v. White*, 2 id., 567; *Carroll v. Cone*, 40 Barb., 220, affmd. by Ct. of Apps., 41 N. Y., 216.) Only liens are preserved. (Bump on Bank., 586 [8th ed.].) When a judgment is not a lien by State law, it is not so treated by bankrupt act. (*In re McIntosh*, 2 B. R., 506; *In re Covart*, 3 id., 508.) And this lien must attach before proceeding in bankruptcy. (1 B. R., 199-599; 2 id., 388; 1 id., 165; 1 id., 190.) The defendants had constructive notice of the bankrupt proceeding. (*People v. Dole*, 38 Me., 558; *Oakey v. Corry*, 10 La. An., 502; *In re Lake*, 6 Bank. Reg., 542; *In re Grigg*, 3 id., 131; *Ex parte Vogel*, 2 id., 138; *In re Wynne*, 4 id., 5.) The plaintiffs can recover of defendants the amount due by them to Yerkes, disregarding the proceedings in Bouvier suit. (*Stevens v. Mechanics' Savings Bank*, 101 Mass., 109; *Mays v. Man. Nat. Bank*, 64 Penn. St., 74; *S. C.*, 4 B. R., 147; Bankrupt Act of 1867, §§ 14, 15 and 16; *Miller v. O'Brien*, 9 Bankrupt Reg., 26; *In re Grinnell*, 9 id., 29-36; *In re Hall*, 2 id., 68.) The plaintiffs, as assignees, succeed to the rights of creditors, as well as the rights of the bankrupt, and may contest the validity of a payment, although the bankrupt could not. (*In re Metzger*, 2 Bank. Reg., 114; *Foster v. Hackley*, 2 id., 131; *Bradshaw v. Klain*, 1 id., 146.) Congress has the power to divest the lien by attachment. (Bump on Bank. [8th ed.], 495, and cases cited; *In re Brand*, 3 B. R., 85; *In re Williams*, 2 id., 29; *In re Ellis*, 1 id., 154; *In re Hornet*, id., 98.)

*R. A. Wight*, for the respondents.

DAVIS, P. J.:

On the trial the court below found the following facts and conclusion of law:

"1. I find that on the 18th day of October, 1871, one John V. Bouvier commenced an action against Charles T. Yerkes, and on that day attachment was issued in said action, which was served on the defendants, who were then owing Yerkes the sum of \$566.96.

"2. I find that on the 10th day of November, 1871, a petition in bankruptcy was filed by a creditor of Yerkes in the United States Court for the eastern district of Pennsylvania against Yerkes, and such proceedings were had that, on the 13th day of December, 1871, Yerkes was duly adjudicated a bankrupt.

"3. That on the 30th day of December, 1871, Bouvier recovered a judgment in his action against Yerkes.

"4. That on the 5th day of January, 1872, a warrant in bankruptcy was issued out of said court to the marshal of that court, to which the marshal made his return, which appears in evidence.

"5. That on the 23d of January, 1872, the plaintiffs were appointed assignees in bankruptcy of all the estate and effects of Yerkes by the same court, and on the 24th of January, 1872, the register in bankruptcy executed to the plaintiffs an assignment by them of all the property, effects, etc., of said Yerkes, which he had on the 10th day of November, 1871.

"6. That the marshal published the warrant and notices relating to same, as appears by his return.

"7. That the plaintiffs published, as required by law, the usual notices of their appointment in four newspapers, three of which were published in Philadelphia and one in New York city, once a week for five weeks.

"8. That all the proceedings in bankruptcy were regular, and the usual notices in such proceedings were served and published as required by that act.

"9. That on the 3d of January, 1872, the defendants paid to the sheriff of the city of New York the sum owing by them to Yerkes, to wit, \$566.96, who then held an execution on said judgment in favor of Bouvier, issued to him on the said 30th day of December, 1871.

"10. That the defendants had no knowledge of the bankruptcy

proceedings against Yerkes, until after the payment to the sheriff of the balance in their hands.

"As conclusion of law, I find that the defendants are entitled to judgment, with costs."

The only question in this case is as to the correctness of the conclusion of law that follows upon the findings. We think the case is controlled by *Miller v. Bowles* (58 N. Y. 253), where it was held that an assignment to an assignee duly appointed in proceedings under the bankrupt act, dissolves the lien of an attachment sued out of a State court, levied upon the property of the bankrupt within four months of the commencement of such proceedings.

In accordance with that case judgment should have been ordered upon the facts found by the court in this case in favor of the plaintiff. There is no controversy as to the facts in the case, and no necessity for a new trial.

The judgment must, therefore, be reversed, and judgment directed for the plaintiff for the sum of \$566.96, with costs of the court below and of this appeal, to be adjusted.

BRADY and DANIELS, JJ., concurred.

Judgment reversed; judgment directed for plaintiff for \$566.96, with costs of the court below and of this appeal, to be adjusted.

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THE LOANERS' BANK OF THE CITY OF NEW YORK,  
APPELLANT, v. SAMUEL JACOBY AND JONATHAN W.  
POTTLE, RESPONDENTS.

*Corporation—legal existence of—when party estopped from denying.*

In an action brought by the plaintiff against one Tigney to recover the possession of certain personal property, the defendants, to prevent the delivery thereof to it, gave a bond reciting the plaintiff's claim and binding themselves for the delivery of the property to the plaintiff, if the delivery thereof should be adjudged in said action. In this action brought upon the said bond, after the recovery of a judgment by the plaintiff in the former action and the return unsatisfied of an execution issued thereon, the defendants sought to amend their answer by putting in issue the corporate existence of the plaintiff. *Held,*

- (1) That, in the proper exercise of its discretion, the court should deny the application;
- (2) That by giving the bond and preventing the delivery of the property to the plaintiff in the former action, the defendants were estopped from denying its legal existence.

APPEAL from an order made at the Special Term, allowing the defendants to amend their answer by putting in issue the incorporation of the plaintiff.

*Robert Sewell*, for the appellant.

*Charles Tracy*, for the respondents.

DAVIS, P. J. :

The plaintiffs commenced an action against William H. Tigney and others to recover possession of certain personal property, which was taken by the sheriff of the city and county of New York, upon an affidavit and papers delivered to him for that purpose. Before the delivery of the property to the plaintiffs, the defendant in this action executed an undertaking entitled in that action, which recited the facts, in respect to the claim of plaintiffs, and the taking of the property by the sheriff, and that the defendant Tigney was desirous of having the property returned to the defendants in that action, and undertook and bound themselves for the delivery of the said property to the plaintiffs (if such delivery should be adjudged), and for the payment of such sum as might, for any cause, be recovered against the defendants in that action. The plaintiffs prosecuted that action to final judgment, and an execution upon the judgment against the defendants therein having been returned unsatisfied, they brought suit against the present defendants upon their undertaking. The defendants put in their answer in this action without putting in issue the corporate existence of the plaintiffs, and they moved to amend their answer at Special Term by inserting the plea of *nul tiel corporation*. The court below granted the motion, and from the order granting the same the present appeal is taken.

The point made upon the appeal is that the defendants in this action, brought upon the undertaking set forth, are not at liberty to



dispute the corporate existence of the plaintiff. Ordinarily, the court would not interfere with the exercise of the discretion of the court below in allowing an amendment to the pleadings. But where it is clearly apparent that such amendment brings in an immaterial and improper issue in the action, the appellate court should interfere.

In this case, it seems manifest that the defendants ought not to be allowed to assert that the plaintiffs were not a corporation. By executing the undertaking in question, they prevented the plaintiffs from getting possession of the property, in the action brought to recover the same, upon proceedings in the nature of replevin, and caused its delivery by the sheriff to the defendants in that action. The plaintiffs recovered judgment against such defendants; but their judgment appears to be unavailing, because of the act of the present defendants in depriving them of the property, by executing the undertaking upon which this suit is brought. Under such circumstances, it would seem to be grossly unjust to permit the defendants to deny the legality of the incorporation of the plaintiffs, especially after such incorporation had been proved and adjudicated in the action in which the undertaking was made. (*Loaners' Bank v. Tigney*, MS. opinion of BRADY, J.)

The defendants have seen fit to answer in such form as to admit the corporate existence of the plaintiffs, and they should be held to the effect of such answer. But it seems to us manifest also, upon authority, that the defendants are estopped in law from denying such corporate existence. The numerous authorities cited by the appellant's counsel, establish a principle which seems to us applicable to the present case. (*Connecticut Bk. v. Smith*, 17 How., 487; *Henriques v. Dutch W. I. Co.*, 2 Ld. Raym., 1535; *Dunn v. Van Horn-ton*, 5 Hals., 270; *Con. Society v. Perry*, 6 N. H., 164; *All Saints' Ch. v. Lovett*, 1 Hall, 213; *John v. Farmers' Bk.*, 2 Blackf., 367; *Ryan v. Valandingham*, 7 Ind., 416; *Dutchess v. Davis*, 14 Johns., 245; *Hartrant v. Bk. of E.*, 2 Mo., 169; *Hughes v. Bk. of Somerset*, 5 Litt., 47; *Worcester Med. Inst. v. Hardiny*, 11 Cush., 285; *Welland Canal v. Hathaway*, 8 Wend., 480; *U. S. Bk. v. Stearns*, 15 id., 316; *People v. Ravenswood Co.*, 20 Barb., 518.) The court on the trial would doubtless exclude the evidence under the proposed amendments, as immaterial, on the ground of estoppel.

FIRST DEPARTMENT, MARCH TERM, 1877.

The case should not, therefore, be embarrassed by any change in the pleading.

The order should therefore be reversed, with ten dollars costs, and disbursements to abide the event.

BRADY and DANIELS, JJ., concurred.

Order reversed, with ten dollars costs, and disbursements to abide event.

THE PEOPLE EX REL. GEORGE PERAULT, APPELLANT, v.  
HENRY B. TURNER, CAPTAIN, ETC., RESPONDENT.

*Militia—discharge from—when granted—Actual, and not constructive service of seven years, required.*

The relator, who had been duly enlisted in the State militia, was expelled from his company on the 8th of April, 1873, at which time he had about a year to serve to complete the seven years of service, required by the Military Code to entitle him to a discharge. Some three years after he was, by a writ of *mandamus*, applied for by him, restored to his company and reinstated in all his rights and privileges as a member thereof, as of the said 8th of April, 1873. Subsequently he applied for a *mandamus* to compel the captain of his company to grant a discharge on the ground that he was entitled thereto, upon the expiration of one year from the said 8th day of April, 1873. *Held*, that the application was properly denied; that the statute requires actual, and not constructive, service, and that the relator was not, under the circumstances, entitled to count the time during which he was expelled from the company.

APPEAL from an order made at the Special Term, denying an application of the relator for a *mandamus* compelling the defendant, as captain of a company in the national guard of the State, to grant to the relator a discharge therefrom on the ground that he had served the time required by law.

H. H. Morange, for the appellant.

J. L. Price, for the respondent.

DAVIS, P. J.;

Under the law in force at the time of the relator's enrollment, he was required to perform service for seven years before he would be

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FIRST DEPARTMENT, MARCH TERM, 1877.

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entitled to his discharge. (Laws of 1862, chap. 477.) Section 253 of the Military Code (Laws of 1870, chap. 80) continued this requirement, as also did the several subsequent amendments thereto. (Laws of 1875, chap. 223, § 59; Laws of 1876, chap. 29, § 3.) It is not disputed that, in point of fact, the relator has not performed seven years of service. He was expelled from his company on the 8th of April, 1873, at a meeting of the company, at which, it appears, the commandant did not preside.

The by-laws of said company required that the commandant, when present, should preside at all meetings. After the lapse of some three years the relator made application to be restored by *mandamus*, and his application was granted, as it appears by the writ set forth in the papers, on the ground that the commandant was present but did not preside at the meeting, and it was ordered by the court that the appellant be reinstated to all his rights and privileges as a member of the company, as of the 8th of April, 1873. At the time of his expulsion he had one year yet to serve before he could be discharged for expiration of service, and he now claims that he is legally entitled to his discharge, because more than the year which he would have been required to serve, if not expelled, has expired.

What the statute requires is actual, and not constructive, service. It is impossible to say that the relator has rendered actual service, and the great lapse of time has occurred by reason of his neglect to institute proceedings for his reinstatement forthwith after his illegal expulsion.

It does not appear by the relator's affidavit that he, at any time during the period of his expulsion, tendered his services or took any steps which can be considered as equivalent to actual service; and it seems to us very clear that he had no legal right to delay till after the period of seven years from his enrollment, before the commencement of the proceedings for restoration, and then insist, as matter of strict legal right, that his deprivation of membership in the company was equivalent to actual service therein.

The court below was right in denying his application on the merits. It could have been properly denied upon technical grounds, but it is not necessary to consider such grounds.

The order of the court below should be affirmed, with ten dollars costs, besides disbursements.

BRADY and DANIELS, JJ., concurred.

Order affirmed, with ten dollars costs, and disbursements.

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SAMUEL ROSENBACK v. THE MANUFACTURERS AND BUILDERS' BANK.

*Deposits made by savings banks — preference in payment of, given by § 48, chap. 371 of 1875 — Receiver of bank — when estopped from questioning acts of officers of.*

Section 48 of chapter 371 of 1875, providing that all the assets of any insolvent bank shall, after the payment of its circulating notes, be applied to the payment of any moneys deposited with it by any savings corporation, applies only to deposits, properly so called, and not to any other form of indebtedness. The receiver of an insolvent savings bank applied, under said section, for an order directing the receiver of the M. and B. Bank to pay over a sum of money, the amount of a call loan alleged to have been made by the unauthorized acts of the officers of the savings bank in converting a deposit for that amount into a loan to the M. and B. Bank. *Held*, that as the savings bank had received collateral security for the loan, and payments on account of the principal and interest thereof from the M. and B. Bank, the receiver could not now repudiate the whole transaction and treat the loan as a deposit within the meaning of said section.

APPEAL from an order made at the Special Term denying an application made by the receiver of the German Up-town Savings Bank, under section 48 of chapter 371 of 1875, to compel the receiver of the Manufacturers and Builders' Bank to pay over to him the sum of \$28,887.42, alleged to be the balance of a deposit made by the savings bank.

*Man & Parsons*, for the appellant.

*Flanagan & Bright*, for the respondent.

DAVIS, P. J. :

Herman Uhl, as receiver of the German Up-town Savings Bank,

applied by petition to the court below for an order directing William A. Butler, receiver of the Manufacturers and Builders' Bank, to pay to him \$28,887.42, the balance of an alleged deposit made by the savings bank in the Manufacturers and Builders' Bank. This application was made under section 48 of chapter 371 of the Laws of 1875 (Session Laws of 1875, pp. 404, 415).

That section provides that "all the assets of any bank or banking association, now or hereafter organized, that shall become insolvent, shall, after providing for the payment of its circulating notes, if it shall have any, be applied by the directors, assignee or receiver thereof, in the first place to the payment in full of any sum or sums of money deposited therewith by any savings corporation."

It is obvious that the provision of this section is applicable only to deposits properly so called, and not to any other form of indebtedness between the corporations named.

The receiver of the Manufacturers and Builders' Bank, in answer to the petition, alleged in substance that all deposits made in such bank by the German Up-town Savings Bank had been paid in full by him out of the assets that came into his hands, and that the amount mentioned in the petition was not a deposit, but was the balance of a call loan of \$40,000 made by the savings bank to the Manufacturers and Builders' Bank, for which collaterals were deposited with the savings bank.

Two questions are presented in the case. The first is one of fact, to wit: whether the sum demanded by the petitioner was a deposit made in the usual way by the savings bank, or a call loan secured by collaterals, as alleged by the receiver of the Manufacturers and Builders' Bank.

The second is a question of law, arising upon the alleged unauthorized acts of the officers of the savings bank in changing the deposit to a call loan. The court below found that the transaction was in fact a call loan, as the transaction was made between the officers of the two banks as a call loan, and was intended to be a loan upon seven per cent interest, secured by collaterals deposited with the savings bank, and payable on demand. The evidence certainly justified this finding. The books of both banks treated the transaction as a call loan.

A payment of \$5,000 upon it was made by a check of the Manu-

facturers and Builders' Bank (an unusual mode, certainly, of paying deposits), which described the indebtedness for which it was given as a call loan. All their acts in relation to the transaction before the insolvency of the respective banks treat it as a call loan.

But it is claimed that this was effected by changing the amount from a deposit in the bank to a loan, by the unauthorized act of certain officers of the savings bank.

The precise mode in which this was done does not appear very clearly in the papers; but it does appear that the \$40,000 was deposited by the officers of the savings bank in the Chatham Bank, to the credit of the Manufacturers and Builders' Bank, and that this sum was placed by the officers of the latter bank in its loan account to the credit of the savings bank.

If it be true that this was a mere change of a deposit of the savings bank in the Manufacturers and Builders' Bank, to a call loan, it, nevertheless, whether authorized or not, in point of fact reduced the deposit of the savings bank, and changed the amount withdrawn therefrom, into a call loan. The question of the legal right or authority of the officers of the savings bank to make this transaction, does not seem to be an important one, because by their acts they have changed the deposits into a loan, as completely and effectually as though clothed with full authority.

The savings bank received the advantages of the collateral securities; of the increased interest, and of the payment made upon the call loan; and it is too late after the insolvency of both banks has occurred, for the petitioner to overhaul and repudiate the transaction for the purpose of converting the loan back to a deposit, on the ground of want of authority in the officers of the savings bank, and thereby securing the statutory preference over all the other creditors of the Manufacturers and Builders' Bank; whatever remedy he may have against such officers for the abuse of their powers, or against the officers of both banks for any fraudulent arrangements to the prejudice of the creditors of the savings bank, he cannot, we think, go so far as to insist that a call loan illegally made, shall be deemed a deposit within the meaning of the forty-eighth section of the act above referred to.

We think that the court below arrived at a correct conclusion in

FIRST DEPARTMENT, MARCH TERM, 1877.

this case, and that the order should be affirmed, with ten dollars costs and disbursements.

BRADY and DANIELS, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

THE PEOPLE EX REL. STEPHEN MURPHY v. FREDERICK  
G. GEDNEY, JUSTICE, ETC., RESPONDENT.

10h	151
65 AD	*474
10h	151
88 Mis	*124

*Lease — demised premises — alley-way — when included in — Curtilage — meaning of — when it passes — Statement of landlord as to demised premises — when admissible — Implied covenant for quiet enjoyment in lease — Eviction — summary proceedings — Quantum meruit.*

The plaintiff's assignor demised to the defendant "the house No. 324 East Fifty-eighth street, in the city of New York." At the time of the demise an alley-way, some five feet in width, ran along the side of the house to a door opening thereon, and to the coal sheds in rear thereof; said alley-way being separated from the adjoining premises by a fence. At the time of the demise, the alley-way was pointed out by the lessor as a portion of the demised premises. The plaintiff, having acquired the rights of the lessor in said lease, erected a building upon the adjoining lot, of which he was the owner, which encroached upon the alley-way some forty-eight inches, thereby injuriously affecting the approach to the door and sheds, and the light and ventilation of the house. Summary proceedings having been instituted to remove the tenant for non-payment of rent; *held*,

- (1) That the plaintiff had no greater rights than had his assignor, and that his right to maintain the action was not strengthened by the fact that he claimed to be the owner of the portion of the alley upon which the building was erected;
- (2) That the alley-way formed a portion of the demised premises;
- (3) That, by the erecting of the building thereon, the tenant was evicted from a portion of the said premises;
- (4) That the plaintiff could not maintain an action to eject him for non-payment of rent.

Upon the grant or demise of a house the curtilage or garden thereof will pass, even though the words "with the appurtenances" are not contained in such grant or demise.

By the curtilage of a house is meant the courtyard in the front or rear, or at the side thereof, or any piece of ground lying near and enclosed and used with the same and necessary for its convenient occupation.

FIRST DEPARTMENT, MARCH TERM, 1877.

In an action to eject a tenant it is competent to prove the statements of the landlord made at the time of pointing out the demised premises, for the purpose of identifying the subject of the lease.

Although a lease contains no covenant of quiet enjoyment, yet there is an implied covenant on the part of the lessor to do no act which will evict the tenant from any substantially valuable portion of the premises.

Where a tenant has been evicted by the landlord from a portion of the demised premises of substantial value, he cannot be evicted in summary proceedings for non-payment of rent so long as such eviction continues.

*Quære*, as to the right of the lessor to bring an action upon a *quantum meruit* to recover the value of the premises still occupied by the tenant.

CERTIORARI to review proceedings had before the respondent, a justice of the District Courts in the city of New York, in summary proceedings between landlord and tenant.

*Julien F. Davies*, for the relator.

*Albert Matthews*, for the respondent.

DAVIS, P. J.:

On the first day of June, 1874, Mary Devlin demised, by lease under her hand and seal, to Stephen Murphy, premises described in said lease as "the house No. 324 East Fifty-eighth street, in the city of New York," for the term of one year, at a yearly rent of \$800, payable monthly in advance; and agreed in the lease that the lessee might, at his option, continue in said premises for five years from the first of June, 1875, at the same rent; and that she would put and keep said premises in repair during the term. The lease contained a covenant of re-entry in case of default in payment of rent. Murphy exercised his right of option to continue the lease for the additional five years; and on May 31st, 1876, Mary Devlin assigned the lease, and all rents to accrue thereunder, to John McKim. McKim, as such assignee, instituted proceedings before the respondent, to remove Murphy from the possession of the premises, for non-payment of two months' rent, which fell due on the first of October and November, 1876, alleging a demand of the rent and default in the payment thereof, and that Murphy and his subtenant continued to hold over and have possession without permission after such default.



The usual summons was thereupon issued by the respondent; and on the return day of the summons Murphy appeared and made affidavit denying that the rent claimed in the affidavit of McKim was due, and setting forth that McKim had wrongfully entered upon the demised premises and taken possession and evicted the tenant from a strip of ground thirty feet in length and three feet four inches in width, extending across the lot; and had placed thereon a building; that the portion so taken was a passage-way leading from the street to a door at the side of the house, and to the coal and wood-house back of, and belonging to the said house; and that by reason of placing the building thereon the tenant was deprived of such way leading from the street, and of the use of the door at the side of the house; and that the light and ventilation of the said house on the side next adjoining the building were shut off; that McKim has since continued in possession of the strip of land, and that no part of the rent was due from the tenant at the time of the entry and erection of the building by McKim; and he, in substance, claimed that no rent was due in consequence of such eviction.

It was proved at the trial, that at the time Murphy leased the house of Mrs. Devlin, there was an alley-way, or side entry, about five feet wide, and a side stoop leading to the side entrance of the house, and that Mrs. Devlin pointed out to the tenant this alley as a part of the property she was leasing; that the alley-way was closed in by a high fence between it and the adjoining lots; that there was a flag walk in the center of such way, and that such passage extended back of the rear of the house about twenty feet; that the fence between it and the adjacent premises was seven or eight feet high; that there was a gate in front of the alley-way with a lock and key, which was kept by the tenant, and wooden steps from the door on the side of the house down to the alley-way; that the tenant took possession of the premises, including this alley-way, and he and his subtenant continued to enjoy the same until McKim, after the assignment of the lease to him, took down the fence and erected the building, which occupied forty-two inches in width of the alley-way, thirty or thirty-eight feet in depth, leaving eighteen inches in width only of the passage-way, and taking away the stoop; and that the building excluded light and air to some

extent from the house; and that this building was placed there against the objections of the lessee.

In this proceeding McKim, as assignee of the lease, occupies precisely the same relation towards the tenant as the original landlord under the lease, and can only enforce the provisions of the lease to the same extent Mrs. Devlin could have done if she were the complainant in the proceedings to remove the tenant.

The point is made that the lease made by Mrs. Devlin does not include the alley-way described in the affidavit of Murphy, but by its language is limited to the land covered by the house. The language of the lease is, "house No. 324 East Fifty-eighth street," and nothing is said concerning appurtenances or privileges of any character. This, however, is altogether too narrow a construction of the instrument. The piece of ground constituting the alley-way was inclosed with the house by a high, board fence, and was in the possession of Mrs. Devlin; it was occupied in part by the stoop leading to the side-door of the house and by a walk of flagging extending to the gate on the street, and it appears without dispute to have been pointed out to the lessee as a part of the demised premises. There seems to be no doubt that, by the grant or demise of a house, the curtilage, or garden, will pass without the words "with the appurtenances" being added. The curtilage is the courtyard in the front or rear of a house, or at its side, or any piece of ground lying near inclosed and used with the house and necessary for the convenient occupation of the house. (Bacon's Abridgment, title "Grant," 1 and 3; *Clements v. Collins*, 2 T. R., 502.)

It was competent to prove the statement of the landlord, made at the time of pointing out the demised premises, for the purpose of identifying the subject of the lease. (*Knapp v. Warner*, 57 N. Y., 668; *Hope v. Balen*, 58 id., 380; *Pettit v. Shepard*, 32 id., 97.)

There was no covenant of quiet enjoyment in the lease, but the lessor was bound by an implied covenant to do no act which would evict the tenant from any substantially valuable portion of the premises. (Taylor's Landlord and Tenant, §§ 304, 318; *Mayor, etc., v. Mabie*, 13 N. Y., 151; *Vernam v. Smith*, 15 id., 327; *Mack v. Patchin*, 42 id., 171.)

There seems to be no reason to doubt that if the lessor, Mrs. Devlin, had entered upon and taken possession of the alley-way,

against the objection of the tenant, and deprived him of the use thereof by the erection of a permanent structure thereon, it would have been an eviction on her part in violation of the rights of the tenant under the lease.

The assignee, McKim, so far as relates to this proceeding under the lease, comes precisely into her position and is subject under this proceeding, which is predicated altogether upon the right of re-entry given by the lease, to the same defense that would have existed against her were she seeking the same remedy. The fact, therefore, which was admitted in proof, that McKim was the owner in fee of the land adjacent to these premises, and of the ground taken possession of by him in erecting the new house, seems to us immaterial in this controversy, for in this proceeding he can be regarded in no light except those which spring out of his relation as landlord, under and by virtue of the assignment of the lease made by Mrs. Devlin to him.

Upon the evidence, therefore, it was a case in which the tenant had been evicted by the landlord, against his objection, from a substantial portion of the demised premises. According to a long line of authorities such an eviction precluded the recovery of rent accruing subsequent to the eviction and while it continues. (*Lawrence v. French*, 25 Wend., 443 ; S. C., 7 Hill, 519 ; *Edgerton v. Page*, 20 N. Y., 283 ; *Christopher v. Austin*, 1 Kernan, 217 ; *Pendleton v. Dyett*, 4 Cow., 581 ; *Peck v. Hiler*, 24 Barb., 178.)

The tenant having ceased by the act of his landlord to become legally liable for the rent, by a permanent occupation operating as an utter exclusion from a portion of the demised premises, the proceedings to remove him for non-payment of rent, cannot, we think, be upheld upon any sound principle of law.

We do not intend to pass upon the question whether the tenant may be liable in an action upon a *quantum meruit*, for the occupation of a portion of the premises ; nor whether the landlord in this case, upon his paramount title, may institute other proceedings to recover possession, independently of the lease, based upon his rights as owner in fee. We go no further than to hold, that in this proceeding, in which he can insist upon no right superior to those which the assignor of the lease could have claimed, the defense of eviction is complete.

The proceedings must be reversed, and a judgment of restoration entered in favor of the relator, with costs against the landlord.

BRADY and DANIELS, JJ., concurred.

Proceedings reversed; judgment of restoration ordered in favor of relator, costs against the landlord.

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HENRY R. WILKINSON, RESPONDENT, v. JAMES GILL,  
APPELLANT.

*Lotteries — what are — 1 R. S. [Edm. ed.], 619, § 32.*

The defendant sold to the plaintiff slips of papers containing numbers, upon which if such numbers were drawn in the Kentucky State Lottery he would be entitled to receive certain sums of money. *Held*, that the sale of those numbers was in fact the sale of an interest in, or "portion of an illegal lottery" set on foot by the defendant, within the meaning of section 32 of 1 Revised Statutes [Edm. ed.], 619.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

This action was brought by the plaintiff to recover back money paid for lottery tickets, and for shares, interests and prizes, or rights to prizes dependent on the drawings of the Kentucky State Lottery.

It appeared from the evidence, that the defendant kept an office on the corner of Pearl and Chatham streets, in the city of New York, where he acted as policy dealer, and dealt in lottery tickets.

There the plaintiff purchased of him, in 1872, lottery tickets, which, if they drew prizes, were there presented to the defendant and the money received by the plaintiff. The prizes depended upon the drawing of the Kentucky lottery. If one number on plaintiff's ticket was drawn in the lottery, it entitled him to a certain sum; if two of the numbers were drawn, he got a much larger sum, and so on in proportion, but if no number on his ticket was drawn, he lost his money and got nothing. By the sale of such tickets it was alleged that the defendant got from the plaintiff \$3,601.08.

The jury found a verdict in favor of the plaintiff for \$1,422.76.

*Charles Matthews*, for the appellant.

*E. H. Benn*, for the respondent.

DAVIS, P. J. :

This action is brought under section 32, part 1, chapter 20, article 4, title 8 of the Revised Statutes (1 R. S., p. 667), which is as follows :

"§ 32. Any person who shall purchase any share, interest, ticket, certificate of any share or interest, or part of a ticket, or any paper or instrument purporting to be a ticket or share or interest in any ticket, or purporting to be a certificate of any share or interest in any ticket, or in any portion of any illegal lottery, may sue for and recover double the sum of money, and double the value of any goods or things in action, which he may have paid or delivered in consideration of such purchase, with double costs of suit."

On the trial, the jury rendered a verdict for the plaintiff for \$1,422.76. The defendant appealed from the judgment entered thereon, and from the order of the court denying the motion for a new trial.

The exceptions to the charge were not sufficiently specific to raise any question for review. It does not appear by the case that the motion to set aside the verdict was passed upon at all by the court below. The motion to dismiss the complaint was properly denied, because there was in the case evidence tending to establish a cause of action. Whether it was sufficient to cover the whole amount demanded by the complaint, or a smaller sum, was not material upon such a motion. We think there was no error in admitting evidence of the destroyed tickets or policies. The testimony shows that the defendant sold to the plaintiff, from time to time, divers numbers, or slips of paper containing numbers, upon which he would be entitled to receive certain sums of money if such numbers were drawn in the Kentucky State Lottery. These numbers were called, in the slang phraseology of the defendant's business, "gigs," "horses" and "saddles." But the name is, of course, of no importance; the statute looks at the substance of the thing. In our opinion, the sale of these numbers was, in fact, the sale of an interest in or "portion of an illegal lottery" set on foot by the defend-

ant, the drawings of which were dependent upon the drawings of the Kentucky lotteries; and that the transactions were within the statute upon which the action is brought, and the plaintiff was entitled to recover back his money. (*Hull v. Ruggles*, 56 N. Y., 424; *Governors of the Alms-house v. The American Art Union*, 7 id., 228.)

Judgment should be affirmed.

BRADY and DANIELS, JJ., concurred.

Judgment affirmed.

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THE PEOPLE EX REL. GEORGE WILLIS v. THE JUSTICES  
OF THE COURT OF SPECIAL SESSIONS, RESPONDENTS.

*Criminal law—evidence of another distinct crime, for purpose of showing intent—admissibility of.*

The plaintiff in error was tried and convicted of petit larceny, the offense having been committed while the complainant was changing a ten dollar bill for him on January 20, 1876. Upon the trial the prosecution was allowed to prove that he had attempted to commit the like crime in the same manner on the 29th of February, 1876, in order to prove intent. *Held*, that the evidence was inadmissible.

*Weyman v. People* (4 Hun, 511); *Bielschowsky v. People* (3 id., 40) distinguished.

CERTIORARI, to review the conviction of the relator of petit larceny by the Special Sessions.

The evidence on the part of the prosecution tended to show that, on the twentieth of January the plaintiff in error entered the complainant's place of business and requested change for a ten dollar bill. Complainant gave him a five dollar bill and five ones, and relator said, "Won't you give me a good five dollar bill; I want to send it in a letter?" Complainant opened his drawer again and gave him a clean one, when he said: "Can you give me a stiff one; a new one?" Complainant did so, and relator said: "That will do," and took it. Complainant said: "You are going to give me five dollars, aint you?" and the prisoner replied that he had done so. In the

confusion of the transaction the complainant was perplexed about the precise nature of the transaction, and the relator went out before complainant was quite certain whether or not he had lost the bill.

Upon the trial the prosecution was allowed to prove that the relator, on the twenty-ninth of February, attempted to play the same trick upon one Meyer, living in Greene street.

*Wm. F. Howe*, for the relator.

*B. K. Phelps*, for the people.

DAVIS, P. J. :

On the trial evidence was given tending to show that the relator, on the 20th January, 1876, committed the crime of petit larceny of the property of one Roden, charged in the complaint.

Evidence was then offered, on the part of the respondent, tending to prove that the relator committed, or attempted to commit, the like crime of larceny of the property of one Meyer, on the 29th of February, 1876.

This evidence was objected to by the relator's counsel.

The objection was overruled and an exception was taken. The court received the evidence, on the ground that it tended to show the intent. After the evidence was in, the relator's counsel objected, upon the ground "that it is a circumstance which occurred between the defendant and another, at an entirely different place; that it is an entirely different offense, if any."

He therefore asked that it be stricken out; the court below overruled the objection and denied the motion. No connection whatever was shown between the transactions, and the latter took place more than a month after the former. The cases cited by the counsel for the people (*Weyman's Case*, 4 Hun, 511; *Bielschofsky Case*, 3 Hun, 40), were cases in which the other transactions admitted in evidence were connected more or less directly with the particular transaction charged against the accused.

They were intimately related both in point of time and in matter of fact, and were therefore held to fall within the rule which permits evidence of other offenses for the purpose of establishing intent.

In *The People v. Copperman* (56 N. Y., 593), it was held that it

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 FIRST DEPARTMENT, MARCH TERM, 1877.
 

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was not competent upon the trial of one offense, to prove that the prisoner committed another not connected with it.

The true rule is laid down with great clearness by DANIELS, J., in *Weyman v. People* (4 Hun, *supra*), and it requires that the transactions shall be so connected as to time, and so similar in their other elements, that the same motive may reasonably be imputed to them. And he extended this rule to cases of larceny. In this case, however, the offenses were distinct and independent of each other, and the most that the second one tended to prove was a propensity in the prisoner to commit the crime of larceny. It was error, under the circumstances, to receive the evidence, and the judgment must be reversed.

BRADY and DANIELS, JJ., concurred.

Judgment reversed.

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JOSEPH SPEARS AND WILLIAM C. SPEARS, APPELLANTS,  
v. THE MAYOR, ETC., OF THE CITY OF NEW YORK,  
JOHN MATTHEWS AND EZEKIEL R. THOMPSON,  
RESPONDENTS.

*Opening of Broadway in New York—chap. 890 of 1869—Assignment of interest in an award—when trust created by—successive assignments—Notice.*

In proceedings instituted under chapter 890 of 1869, to widen and straighten Broadway, an award of \$40,000 was made to the defendant Thompson as the owner of a leasehold interest in several lots taken by the commissioners, and confirmed by the court December 28, 1870. On December 31, 1870, Thompson, by an instrument in writing, sold and transferred to the plaintiff's assignor \$12,262 out of the said award, and covenanted therein that an award, exceeding in amount \$12,262, had been made to him by the commissioners and confirmed by the court; that there were no liens thereon; that he had done and would do nothing to prevent the collection of said amount, and authorized said assignee to demand, receive and receipt for the said sum, and also authorized the comptroller or chamberlain of the city to pay the same.

Subsequently the Special Term of this court, under chapter 57 of 1871, vacated and set aside the said report, and appointed new commissioners to make a new assessment both as to awards for damages and appraisements for benefits. In these proceedings an award was made to Thompson of \$11,544, which was sub-



sequently confirmed by this court. *Held*, that the assignment, with the covenants therein contained, created between Thompson and his assignee, the relations and all the obligations of a trust which a court of equity would enforce upon any specific award of damages which might be made for Thompson's leasehold interest in the premises, even though the award referred to and described in the assignment had been set aside.

On the 11th of January, 1871, and prior to the setting aside of the \$40,000 award, Thompson executed a mortgage to one M. upon the lease and leasehold premises taken for said widening, for \$12,350 and interest, which said mortgage was duly recorded, and at the same time assigned the said sum of \$12,350 out of the \$40,000 award. At the time of taking the mortgage M. had knowledge of the prior assignment. *Held*, that the claims of the first assignee upon the amount finally awarded were superior to those of one claiming under the mortgage and assignment to M.

APPEAL from a judgment dismissing the complaint of the plaintiff, with costs.

*Ect. Taft*, for the appellants.

*H. E. Davies*, for the respondents.

DAVIS, P. J. :

Under the provisions of chapter 890 of the Laws of 1869, proceedings were taken for the widening and straightening of Broadway, between Thirty-fourth and Fifty-ninth streets, in the city of New York. At that time the defendant Thompson was the owner of the leasehold interest in several lots of land which were taken under such proceedings. The commissioners of estimate and assessment, awarded to Thompson, as compensation for such taking, the sum of \$40,000; and this award was confirmed by the Special Term of this court on the 28th of December, 1870; afterwards and on December 31, 1870, Thompson, by an instrument under his hand and seal, which described himself as lessee of the premises on Broadway, for a good and valuable consideration, sold, assigned, transferred and set over to one Abram V. Davis, his representatives or assigns, the amount of \$12,262, out of the award made to him on account of loss and damage to said premises, occasioned by the widening and straightening of said street, and the assignment contained a covenant that a sum exceeding the said sum of \$12,262 had been awarded to him by the commissioners on account of such loss and damage

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FIRST DEPARTMENT, MARCH TERM, 1877.

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done to said premises, and that such award had been confirmed by the Supreme Court; that said award was made to him as lessee of said premises, and that there were no existing liens on said award; and that he had not done and would not do any act or thing to prevent the collection of said claim to the amount of \$12,262; and he authorized such assignee to demand and sue for, collect and receive, receipt for and sign his name to any papers that might be necessary to procure the payment of the said sum, out of the amount of said award; and also authorized the comptroller or chamberlain of the city to pay said assignee that sum out of the amount so awarded to him. On the 28th day of January, 1871, Davis assigned all his right, title and interest in said assignment, to the plaintiffs. On the 11th of January, 1871, the defendant Thompson executed and delivered to the defendant Matthews a mortgage upon the lease and leasehold premises so taken for the widening of Broadway, to secure to him the sum of \$12,350, and interest, which mortgage was duly recorded in the office of the register of the city, and at the same time and for the same consideration, Thompson also, by an instrument under his hand and seal, assigned the said sum of \$12,350, out of said sum of \$40,000 so awarded to him, by the report and confirmation above set forth. At the time this mortgage and assignment were made and delivered by Thompson to Matthews, Matthews had notice of the fact, that Thompson had made the above mentioned assignment to Davis. Subsequently and under the provisions of chapter 57 of the Laws of 1871, passed February 27, 1871, the Special Term of this court vacated and set aside the order of confirmation of the report of the commissioners of estimate and assessment in the matter of widening and straightening Broadway, and appointed other commissioners who were directed to proceed to amend and correct the report made to the court, and to make a new assessment, both as to awards for damages and appraisements for benefits, and to report the same to the court.

Such proceedings were thereupon had, that a new report was made by the new commissioners which was confirmed on the 5th day of July, 1872, and the damages to the defendant Thompson, on his leasehold premises, taken for widening and straightening Broadway were estimated at the sum of \$11,544, and the commissioners reported that said award of \$11,544, was subject to the mort-

gage from Thompson to Matthews. The plaintiffs asserted their claim by reason of the assignment of Thompson to Davis, and of Davis to them, as above stated, and made application to the city authorities at the proper time for the payment to them of said sum of \$11,544, which such authorities refused to make. They thereupon commenced this action, impleading the city with Thompson and Matthews, before any portion of the money had been paid out of the treasury.

It is objected that this action will not lie because the plaintiffs would have a perfect remedy at law, under the act of 1873, against Matthews, after the moneys should have been paid to him, if their title thereto be superior to his. But this objection, we think, does not prevent the institution of the proceedings in this case to determine the right to the fund, before its payment by the city to any one. The vacating of the order confirming the first award of damages and the appointment of new commissioners to make new estimates and assessments, left the original proceedings for widening and straightening Broadway in full vigor. The leasehold interest of Thompson, which had been taken for that purpose was still regarded as taken, and the only question open to the new commissioners was a reconsideration of the amount to be awarded, as the just compensation required by the Constitution and laws of the State.

The new proceedings were in substantial analogy to the perfecting of an assessment of damages, after a judgment wherein the rights of the parties have been fixed, and the question of damages alone remains to be determined.

The first question to be considered is, what are the rights of the plaintiffs as assignees of Davis, as against Thompson his assignor, to whom these several awards were made; and in considering that question we may properly exclude all questions affecting the defendant Matthews.

The assignment to Davis, of a specified portion of the award, after its confirmation by order of the court, accompanied by the covenants above mentioned, we think, as between Davis and Thompson, created the relation, and all the obligations of a trust, which a court of equity would have enforced as between them, upon any specific award of damages upon the leasehold interest, notwithstanding the one referred to and described in the assignment had been

set aside or vacated. The substance of the thing assigned and affected by the covenants was not the particular award, but the portion of that or any award that should be made for the damages resulting from the taking of Thompson's land by the city, in the proceedings pending for that purpose. These damages had become, and but for the subsequent action of the court and the new commissioners, would have remained fixed and absolute at \$40,000. It has been adjudged that the proceedings of the court, and the act of the legislature under which these proceedings were taken, were constitutional and therefore to be upheld. (*Matter of Broadway*, 61 Barb., 488; S. C., 49 N. Y., 150; *Garrison v. Mayor, etc.*, 21 Wallace [U. S.], 196.)

The vacating of the former proceedings did not therefore set back the rights of Thompson in the leasehold premises, to the position in which they stood before any proceedings for widening and straightening Broadway were taken, but left them subject to all rights secured to the city by the pending proceedings, and subject to a readjustment of his compensation for loss and damage. If the question, therefore, in this case arose between himself and his assignee, Davis, or the plaintiffs, there would seem to be no reasonable ground for saying that a court of equity would not grasp the substance of the thing rather than the shadow, and hold it to be impossible for Thompson, who retained the leasehold interest, to shake off the rights of Davis under the assignment by virtue of any thing in the proceedings for a reassessment.

On the contrary, equity would hold that that assignment attached, as against Thompson, to whatever amount of any appraisal of such damages made in the new proceedings would be necessary to satisfy the assignment to Davis. And even if the whole proceeding had been abandoned by the city, and Broadway had not been widened, and the leasehold property of Thompson not taken at all, there would, we think, be no difficulty in charging the amount specified in the assignment, as a specific lien upon the leasehold property, in the nature of an equitable mortgage, to be enforced against Thompson by a court of equity. Doubtless, when Thompson executed the second assignment to the defendant Matthews, and made a mortgage of the leasehold property to secure payment of the amount then assigned, it was supposed by all parties that the compensation

was fixed by the confirmation of the court, and that there would be enough, and more than enough, to pay both assignees in full. Neither of the parties anticipated the subsequent action of the legislature and of the courts; and neither supposed that the sum to be awarded would not be adequate to protect and pay both assignees.

Under such a state of facts, it seems quite clear that if Matthews, in taking the second assignment and mortgage, had acted without notice of the assignment to Davis, and in good faith for a valuable consideration, his mortgage upon the leasehold property, and the record thereof, would have given him the priority by reason of his greater vigilance in fortifying his assignment by a mortgage of the leasehold property. But the court below has found, and there seems to be no reason to doubt the correctness of the finding, that when Matthews took his assignment and mortgage he knew and had full notice of the prior assignment by Thompson to Davis; and it is a just and fair inference that he intended to take his assignment as a second lien upon the award, deeming it abundantly secure, because the amount of the award far exceeded the sum covered by both assignments. Beyond all question, in respect to the first award, he was subordinate and subject to the prior assignment. His mortgage gave him no superiority. Davis would have been entitled to be first paid; and if no greater sum than sufficient to do that could have been collected for any reason, from the city on the first award, Davis, or the plaintiffs as his assignees, would have been entitled to the money in priority of any claim that Matthews could assert. What has occurred to change the character of their rights? Nothing of which they both did not have full notice, and nothing which either could have prevented.

If the assignment to Davis remains in full vigor, as between him and Thompson, upon the subsequent award, how does the fact that Matthews had also a recorded mortgage upon the leasehold premises give him a superiority which he did not possess in respect to the first award? In form, it has had that effect, because the commissioners in their examinations for incumbrances upon the land to which the city was acquiring title, found a recorded mortgage and recognized it in their report as a lien to be extinguished. But this is mere form. For, in substance, the lien of that mortgage, though in form upon the land, is not prior, in respect to the moneys awarded,

to the older assignment of which Matthews had notice, or to the equities which he is bound to recognize and respect.

The whole case seems to us to turn upon the question of notice ; and that being distinctly found, equity has no difficulty in disregarding forms for the purpose of enforcing substantial rights.

It is our opinion, upon the facts found by the learned court below, that judgment should have been awarded to the plaintiffs, and that the moneys in the hands of the city should have been directed to be applied, after the deduction of such costs as the city may be entitled to, upon the assignment held by plaintiffs, so far as necessary to extinguish the same and the balance, if any, should be paid to the defendant Matthews.

We see no difficulty in the way of this court pronouncing the judgment that ought to have been given by the court below. All the necessary facts are before us, and the error of the court was simply in the conclusions of law arising from the facts.

The judgment should therefore be reversed, and judgment ordered in favor of the plaintiffs in conformity with this opinion, to be settled by the presiding justice upon three days' notice.

The costs of the city in the court below should be deducted from the fund, and the plaintiffs should have costs, both of the court below and of this appeal, against the defendant Matthews.

BRADY and DANIELS, JJ., concurred.

Judgment reversed, and judgment ordered in favor of plaintiffs, in conformity with opinion, to be settled by DAVIS, P. J., on three days' notice ; costs of the city in the court below to be deducted from the fund ; plaintiffs to have costs of court below and of this appeal against the defendant Matthews.

## HENRY W. HUBBELL, RESPONDENT, v. THE GREAT WESTERN INSURANCE COMPANY, APPELLANT.

*Policy of insurance — right of abandonment — acceptance of.*

The plaintiff took out policies of insurance upon a ship and cargo owned by him, and also procured one to be issued to him by the defendant upon the freight. The latter policy provided that "no claim for total loss shall be made \* \* \* except in the case of \* \* \* an actual or technical loss of the vessel under the policies of insurance on her." The vessel was wrecked at a short distance from her port of destination, and both vessel and cargo abandoned to the underwriters, including defendant, who took possession of the ship and succeeded in transporting a portion of the cargo to the said port, where it was sold and the proceeds arising thereon distributed among them.

An abandonment of the freight was also made, but the same was not accepted by the defendant. *Held*, that the plaintiff had the right to abandon the freight, and that the defendant was liable under the policy for a total loss thereof, and that his right so to do was not affected by the fact that the underwriters succeeded in transporting a portion of the cargo to the port of destination and there disposing of the same.

*The Buffalo City Bank v. The North-western Ins. Co.* (30 N. Y., 251) followed.

Where an abandonment has been accepted, the question as to whether or not the loss was a total one is no longer an open one, but where it has not been accepted, the insured must establish by satisfactory proof a state of facts clearly showing his right to abandon.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

*Joseph H. Choate*, for the appellant. The law is well settled that, as between insured and insurers on freight, the insured, or the master, as representing him, is bound, in case of disaster, to forward the goods to the port of destination, so as to earn the freight, if it is possible to do so; where the freight insured is that which is to be earned under a bill of lading, he has the right to hold on to the goods and forward them for the very purpose of earning his freight; and if he abandons them or lets the shipper take them without paying the freight, it is his own loss, and he cannot throw it on the underwriters of that interest. (*Bradhurst v. The Columbian Ins. Co.*, 9 Johns., 17; *Griswold v. The N. Y. Ins. Co.*, 3 id., 321; *Hugg v. The Augusta Ins. and Banking Co.*, 7 How. [U. S.],

FIRST DEPARTMENT, MARCH TERM, 1877.

595; *Salvus v. Ocean Ins. Co.*, 14 Johns., 138; *Palmer v. Lorillard*, 16 id., 348; *Howard v. Astor Mut. Ins. Co.*, 5 Bosw., 38; *Ogden v. The Gen. Mut. Ins. Co.*, 2 Duer, 204; *Allen v. The Mercantile Mut. Ins. Co.*, 44 N. Y., 437; *Lord v. The Neptune Ins. Co.*, 10 Gray, 109; *Scottish Ins. Co. v. Turner*, 1 MacQueen's App. Cas., 334.)

*Henry J. Scudder*, for the respondent.

DAVIS, P. J.:

This action is brought upon a valued policy of insurance on the freight of the ship *Tartar*.

The freight was valued in the policy at \$25,000. It, as well as the ship and the cargo, belonged to the same owners, and by the policy the loss thereon, if any, was payable to the plaintiff.

The ship was insured for \$50,000, valued at \$70,000, and of this insurance \$10,000 was in the defendant's company. The cargo was insured for \$125,728. The value of the cargo in bond was about \$152,000, but about \$182,000 in market, after payment of duties. On the 3d of February, 1867, the ship was stranded at Deal beach, about fifty miles from the city of New York which was her port of destination, and became a total loss. On the fifth of February following, the ship and cargo were abandoned to the respective insurers; and these abandonments were accepted by them. The freight (as the jury must be regarded as finding) was at or about the same time abandoned to the defendants, but the abandonment thereof was not accepted. The Coast Wrecking Company, shortly after the stranding of the ship, took possession of her and made efforts to save her and her cargo. This possession was taken at first with the consent of the master, but after the abandonment the wrecking company was employed by the underwriters, and acted as salvors and agents. A very small amount in value of the material of the ship was saved, but a considerable portion of her cargo was taken out by the company and carried to New York, where it was sold for the benefit of the several underwriters. The gross value of cargo thus saved was \$66,899.63, but out of that sum there was paid \$14,165.80 for expenses, and \$18,743.38 for salvage, leaving of actual net proceeds of cargo, the sum of \$28,115.37. The actual net



proceeds for materials saved from the ship after deducting salvage and charges was \$2,341.84.

The defendants received their share of the proceeds of the materials saved from the ship. After the abandonment, the plaintiff had nothing to do with the ship or cargo, nor had any one on his behalf. The policy on the freight contained these words: "No claim for total loss shall be made under this insurance, except in the case of loss of more than fifty per cent of the freight on board, and also an actual or technical loss of the vessel under the policy of insurance on her, any savings of freight then on board to be for the benefit of the company, but in case the vessel is not totally lost, the liability, under this insurance, is not to be greater than the actual loss by the destruction of the freight on board." The defendants admitted their liability for the freight, on so much of the cargo as was lost and paid the same, but they denied all liability for freight on so much of the cargo as was rescued by the wrecking company in bulk and brought to New York. The right of the plaintiff to make a total abandonment of the freight seems to be clearly established by the evidence in the case. The ship was both an actual and technical loss, and the defendants accepted the abandonment of the vessel, under the provisions of their policy on her as a total loss. This acceptance by the defendants, and by the other underwriters, of the ship as a total loss, necessarily conceded the absolute inability of the vessel to complete her voyage and deliver her cargo at the port of New York. The abandonment of the cargo as a total loss was accepted by the several insurers of the cargo. These abandonments of ship and cargo, and the acceptance thereof, entitled the abandonees to the possession of the wreck and cargo on board, and to treat the same, or whatever thereof could be rescued by their agents or by salvors, as salvage the proceeds of which should be applied to their benefit. This salvage was carried by the underwriters to the port of New York, not as a continuation of the voyage for the purpose of earning freight *pro tanto*, but as salvage to be disposed of and applied in accordance with their respective interests. The plaintiff appears to have been consulted to some extent, in respect to the disposition of the salvage, but the evidence of his connection with it was not sufficient to have justified the jury in finding that he received any portion of it as cargo, delivered from

FIRST DEPARTMENT, MARCH TERM, 1877.

the vessel for the purpose of earning any portion of the freight. But for a single circumstance of distinction, we should regard this case as completely disposed of by *The Buffalo City Bank v. The North-western Insurance Co.* (80 N. Y., 251). In that case the vessel, cargo and freight all belonged to the same owner, and each was insured in different companies, the defendant being insurer only of the freight lost. The owner made abandonments of the different subjects of insurance to the respective underwriters, which were accepted. The insurers of the cargo sent persons to the wreck, and saved and caused to be brought into port a very large proportion of the cargo, but in a damaged condition. The defendant insisted that the plaintiff was not entitled to recover for a total loss of the freight, but only *pro rata* upon so much as was wholly lost. The trial court held otherwise, and gave judgment for the whole amount of the freight. The only difference between the facts in that case and the present is, that the defendants in that case, who were insurers of the freight list, accepted the abandonment.

The Court of Appeals sustained the recovery in that action, holding that the owner having abandoned the freight as a total loss, and the defendant having accepted the same, such acceptance was conclusive upon it, and the plaintiff was entitled to recover the full amount of the freight, and not merely freight *pro rata itineris*. DENTON, Ch. J., in the course of his opinion, after alluding to the fact of the acceptance of the abandonment, says: "But I think there was just occasion for abandonment. The vessel became a total wreck at an intermediate point which was not a port, and vessel, cargo and right to freight, were *prima facie* lost. No freight had been earned, and the vessel which was to have earned it was broken to pieces. If any could have ever been earned, it would not have been in any natural, but in an extraordinary way, as by the owner of the cargo accepting it where it then was, or by getting it to the port in some other way.

"Abandonment is said to be justified by any thing which, in the course of the voyage, constitutes at that time a total loss. If any thing subsequently occurs, as a rescue in the case of a vessel captured, or the getting the cargo to port in another vessel, it is the good fortune of the underwriters, but it does not affect the legality of

the abandonment. (*Holdswoorth v. Wise*, 7 B. & C., 794; 14 Eng. C. L., 355.)”

He held, also, that the defendants, as insurers of freight, succeeded to all claims for freight which Bruce (the owner) would have had against the owners of the cargo had it been owned by any other person. The precise state of things described in the opinion of the learned chief justice, in that case, have occurred in this, so far as respects the total loss of the ship and freight at the time the abandonment was made.

The absence of the acceptance of the abandonment of the freight by the defendant, in this case, only leaves open the question whether such abandonment was rightfully and properly made. If it were, the same conclusions attach to it, we think, as though it had been accepted by the defendant. The only difference, as it seems to us, being that where the abandonment is accepted, the question of total loss is no longer an open one, but where the abandonment is not accepted the insured is obliged to establish by satisfactory proof, a state of facts clearly showing the right to abandon. That state of facts was in this case clearly proved. The vessel was stranded, and despite all efforts to save her was destroyed by the action of the waves. The abandonment, as a total loss, was accepted by the defendant upon its policy on the vessel. Her cargo was also abandoned as a total loss to the underwriters and accepted by them; and salvors, or agents in their behalf, were engaged in an attempt to save so much of it as it might be possible to rescue. Whatever was saved was in a damaged condition, and would have been totally lost, but for the interference of the abandonees, or salvors. Upon such a state of facts the abandonment of the freight to the defendant was a plain, legal right under the stipulations of the policy. The exigency had arisen upon which, by the terms of the contract, abandonment as a total loss, might be made; for we think no one can doubt that at the time of the abandonment, both vessel and cargo were justly to be regarded as a total loss, notwithstanding the intervention of subsequent circumstances saved a portion of the damaged cargo. The principles, therefore, which controlled the case of the *Buffalo City Bank v. The North-western Ins. Co.* (*supra*) seem to us to be entirely controlling of the present case. The case under the policy for total abandonment having thus been established, the policy itself provides

FIRST DEPARTMENT, MARCH TERM, 1877.

for the disposition of any savings of freight in a clause which is in these words: "Any savings of freight, then on board, to be for the benefit of the company." And it was for the defendant, if the abandonees of the cargo succeeded in getting any portion of it into port under such circumstances that there were "savings of freight," to see to it that their rights to such savings, under the abandonment, were enforced as against the other abandonees.

They cannot, we think, charge their liability for a total loss, under the policy, by proving that the abandonees of the cargo have applied to their use, such savings of freight; but we, by no means, intend to indicate that upon the state of facts existing in this case, there could be any such claim.

The true rule, on that subject, is probably that laid down by Chancellor KENT, in *Davy v. Hallett* (3 Caines, 16). (See *Wallerstein v. Columbia Ins. Co.*, 44 N. Y., 208; *Allen v. Mercantile and Mutual Ins. Co.*, id., 437.) We are not insensible to the ingenious argument of the learned counsel for the appellant, nor to the embarrassment which some of the points made by him bring into this case, yet the consideration we have been able to give to it, leads us satisfactorily to ourselves, to the conclusion that the judgment of the court below is right and should be affirmed.

BRADY and DANIELS, JJ., concurred.

Judgment affirmed.

On motion for a reargument made at this term, the following opinion was delivered:

DAVIS, P. J.:

It is not correct to say that the court, at the close of the charge, withdrew the question of abandonment from the jury. On the contrary, the question was, and was intended by the court to be left to the jury. It was supposed, when the former opinion was written, that the verdict necessarily involved the finding of a formal abandonment. Our attention is called to a request of the plaintiff, made at the close of the charge, which is in these words: "I ask your honor to charge that if the jury find that there was no formal abandonment of the freight, and they find that no part of the cargo reached the plaintiff at the port of destination *in specie*, they may still find for

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FIRST DEPARTMENT, MARCH TERM, 1877.

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the plaintiff, for there was then a total loss of the freight." "The court so charged." If the jury found, as they may have done, that there was no formal abandonment of the freight, but that no part of the cargo ever reached the plaintiff *in specie*, it seems to us that the plaintiff would still be entitled to a verdict. The cargo was taken possession of by its abandonees, and by salvors, under such circumstances and for such purposes that its character was changed; and by the terms of the contract between these parties, the right to freight was transferred to the defendants. Unless some portion of the cargo came to the plaintiff's hands *in specie* and *as cargo*, no freight would be earned entitling defendants to a deduction from its total loss, whatever rights defendants may have had to participate in the distribution of the salvage.

There was no error in charging the request. We find no reason to change our views as to the correctness of the verdict and judgment, and wish to add nothing further than to indicate that if the jury found favorably to plaintiff on either of the propositions submitted, to wit, the abandonment or the delivery *in specie* to plaintiff of any part of the cargo, the plaintiff was entitled to recover.

The motion for reargument should be denied.

DANIELS, J., concurred.

Motion denied.

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ALGERNON S. SULLIVAN, PUBLIC ADMINISTRATOR, AND  
AS ADMINISTRATOR, ETC., OF DOMINIQUE STROMENER,  
DECEASED, RESPONDENT, v. CHARLES B. FOSDICK AND  
OTHERS, EXECUTORS, ETC., OF HENRY DELAFIELD, DECEASED,  
APPELLANTS.

*Statute of limitations—money deposited at interest subject, to draft—burden of proof as to draft—Administrator with will annexed—administers entire personally—what assets justify his appointment—the appointment cannot be attacked collaterally.*

Where money is deposited with any individual, not a banker, trustee or agent, upon an agreement that he shall pay interest thereon, and that the same shall not be withdrawn except by drafts, payable thirty days after sight, no presumption of payment arises, nor will the statute of limitations run against the

debt, until it is shown that drafts drawn against the said person, in pursuance of the agreement, have been presented and dishonored.

It rests upon the party claiming the benefit of the statute to show the presentation and dishonor of such drafts.

In March, 1854, \$4,000 was deposited with one D., upon the agreement that he should pay interest thereon at the rate of six per cent per annum, and that the principal should only be withdrawn by drafts payable thirty days after sight. March 7, 1855, D. wrote to the depositor stating that he had credited him with \$240, being the interest to March 1, 1855.

In an action brought by the administrator of the depositor in 1876, *held*,

- (1) That no presumption of payment arose under the statute of limitations in regard to the \$4,000, until the presentation and dishonor of drafts drawn against the same;
- (2) That the letter informing the depositor that the interest due March 1, 1855, had been credited to him, did not have the effect of adding the amount thereof to the principal, so as to cause it to bear interest thereafter, nor did it make that amount then due, so that the statute of limitations would then commence to run against it.

Where an application is made to a surrogate for letters of administration upon the estate of one who has died in a foreign country, upon the ground that he has left assets in the county of such surrogate, it is sufficient if it appear that the deceased had a claim against a resident of the said county for money deposited with him, even though it should subsequently be shown that such claim was invalid and incapable of enforcement.

Where a surrogate has issued letters of administration, with the will annexed, upon the estate of one who has died in a foreign country, neither the validity of the will nor the authority of the administrator can be attacked, by one against whom an action is brought to recover a debt alleged to be due to the estate.

The authority of an administrator, with the will annexed, is not confined to the property disposed of by the will, but it is his duty to collect and administer the entire personal estate within his jurisdiction.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

This action was brought to recover the sum of \$4,000 and interest, which sum was deposited by Dominique Stromener with Henry Delafield.

The Abbe Stromener, a priest, at Jeremie, Hayti, in November, 1853, forwarded to Henry Delafield two drafts amounting to \$4,000, upon which Mr. Delafield, in February, 1854, realized that sum.

It was agreed that the moneys should be left in Mr. Delafield's hands at six per cent interest, to be drawn only as follows: "And when you wish to withdraw them you can draw on me at thirty days' sight, if that is preferable to sixty days' sight."

On March 1, 1855, Mr. Delafield credited Mr. Stromener with \$240, the interest on the above sum to March 1, 1855, and on March seventh advised him thereof by letter.

Mr. Stromener died in 1856 or 1857, and his death was admitted by Mr. Delafield. He left an olographic will, which was proved, under the laws of Hayti, in 1875, and an exemplification thereof was duly adjudicated upon and admitted to probate by the surrogate of the county of New York, by decree made November 30, 1875. The surrogate of said county also by an adjudication by him duly made granted letters of administration, with the will annexed, to the plaintiff, January 3, 1876.

The following is a copy of said will :

"Jeremie, the eighteenth January, thousand eight hundred fifty-six. To Miss Rosemonde Gaveau.—I come to thank you by this letter for all the good care you have bestowed upon me for six years ; cares which appear to me like those of a mother or a sister. Therefore, in thankfulness I declare to you that on my death the trunk and all that it contains shall belong to you. That trunk which I have intrusted to you, and which you have deposited with you.

"Your friend,

"(Sd.) DOMINIQUE STROMENER."

Henry Delafield died in 1875 and the defendants duly qualified as his executors.

Thereupon the proper draft and demand having been made of defendants, and they having refused payment, this action was brought ; to which the defendants, after sundry admissions and denials, pleaded : 1. Payment ; 2. Statute of limitations.

Upon the trial the defendants offered no evidence, and the only questions raised by them were : 1. The statute of limitations ; 2. Presumption of payment ; 3. That the paper proved as Mr. Stromener's will was not a will ; 4. That plaintiff, in administering the estate, is limited to the assets mentioned in the will.

The referee reported in favor of the plaintiff, and the defendants have appealed from the judgment thereupon.

*Flamen B. Candler*, for the appellants. The plaintiff, in the capacity of administrator with the will annexed, had no right to bring an

action for the claim mentioned in the complaint, for an administrator with the will annexed has interest only in the property disposed of by the terms of the will. The will only disposed of a trunk and its contents, the evidence not disclosing what were the contents. Even where a demand is required, either by rule of law or by express agreement of the parties, before a right of action accrues, yet, after a reasonable lapse of time, a demand will be presumed. (*Codman v. Rogers*, 10 Pick. [Mass.], 113; *Angell on Limitations* [6th ed.], 95, § 96.) As a general rule, where an act on the part of the creditor is necessary to fix the liability of his debtor, the act must be performed within six years from the date of the contract. (*Morrison v. Mullin*, 34 Penn. St., 12.) If in a contract to pay money on a condition no time of payment or performance of the condition be fixed, the statute begins to run after the expiration of a reasonable time for payment. (*Doe v. Thompson*, 2 Fost. [N. H.], 217; *Laforge v. Jayne*, 9 Penn. St. 410; *Pittsburg and Connellsville R. Co. v. Byers*, 8 Casey [Penn. St.], 22; *McCully v. Pittsburg and Connellsville R. Co.*, 8 Casey, 25; *Pittsburg and Connellsville R. Co. v. Graham*, 12 id., 77; *Pott v. Clegg*, 16 Mees. & Wels., 321; *Bank of Missouri v. Benoist*, 10 Mo., 519; *Foley v. Hill*, 1 Phil. Ch. R., 404; *Topham v. Braddick*, 1 Taunt., 572; *Mitchell v. McLemon*, 4 Texas, 151; *Lyle v. Murray*, 4 Sandf., 590.) Even if the statute has not run against the principal of the loan in the case at bar, for which a thirty or sixty days' draft or demand was made necessary by the terms of the agreement, the plaintiff's alleged claim against that part of the interest which was due prior to six years before the commencement of this action is barred by the statute of limitations. (*Greenleaf v. Kellogg*, 2 Mass., 568; *Cooley v. Rose*, 3 id., 221; *Herries v. Jamieson*, 5 Term. Rep., 553.) A demand for the interest in the case at bar was not necessary before the right of action accrued for such interest. (*Pott v. Clegg*, 16 M. & W., 321; *Carr v. Carr*, 1 Meriv., 541 n; *Devaynes v. Noble*, 1 id., 568; *Sims v. Bond*, 5 Barne. & Adolph., 38; *Foley v. Hill*, 1 Phil. Ch. R., 399; affirmed in 2 House Lord Cases, 39; *Bouvier's Law Dict.*, "Deposit;" *Bank of Missouri v. Benoist*, 10 Mo., 419.) No demand is necessary, in the absence of an



express agreement requiring it, before an action for a loan or deposit of money against an ordinary individual who is not a banker, nor an agent, nor a trustee. (See dissenting opinion of WRIGHT, J., in *Payne v. Gardiner*, 29 N. Y., 174; *Johnson v. Farmers' Bank*, 1 Harr. [Del.], 117; *Darnall's Exrs. v. Magruder*, 1 Harris & Gill, 439, Md. Ct. App.; *Laforge v. Jayne*, 9 Penn., 410; *Cook v. Cook*, 19 Tex., 434.) A provision to pay a note "at any time within six years" is a promise to pay on demand, though not in itself a note, and the statute runs from the date of the promise. (*Young v. Weston*, 39 Me. [4 Heath], 492; Parsons on Contracts, vol. 3, \*92; *Little v. Blunt*, 9 Pick. [Mass.], 488; *Wenman v. Mohawk Ins. Co.*, 13 Wend., 267; *Perry v. Griffith*, 1 Harris & Gill [Md.], 439; *Norton v. Ellam*, 2 Mees. & Wels., 461; *Banough v. White*, 4 Barne. & Cress., 325; Angell on Limitations [6th ed.], § 95, and note; *Swift v. Lanier*, 1 Hill [S. C.], 31; *Stafford v. Richardson*, 15 Wend., 302; *Hickok v. Hickok*, 13 Barb., 632; *Lyle v. Murray*, 4 Sandf., 591; *Leonard v. Pitney*, 5 Wend., 30; *Allen v. Mills*, 17 id., 202.)

*James S. Stearns*, for the respondent. The statute does not begin to run until default made. (*Payne v. Gardiner*, 29 N. Y., 146; affirming *Payne v. Slate*, 39 Barb., 634; *Sweet v. Irish*, 36 id., 467; 2 Greenl. on Ev., § 435; Cowen's Treatise, § 1098.) No such presumption of payment can arise until the lapse of a certain period after the cause of action has accrued. (*Ingraham v. Baldwin*, 9 N. Y., 47; *Jackson v. Hotchkiss*, 6 Cow., 403; *Jackson v. Pierce*, 10 Johns., 417; *Heyer v. Pruyn*, 7 Paige, 470.) The letters of administration are conclusive evidence of the authority of the persons to whom granted. (2 Edm. Stat., 82, § 56; *Belden v. Meeker*, 47 N. Y., 310; same as to Public Administrator, 2 Edm. Stat., 127, § 23.)

DAVIS, P. J.:

In deciding this case, the learned referee, WILLIAM M. PRITCHARD, Esq., delivered the following opinion:

"In November, 1853, Dominique Stromener, an ecclesiastic, residing at Jeremie, in the Republic of Hayti, sent to defendants' testator drafts due about 1st March, 1854, and then paid, for \$4,000, which amount he desired Mr. Delafield to retain and allow him interest

upon it. Mr. Delafield declined to allow interest if he was to be liable to refund the money on demand; and it was thereupon agreed between them, that in order to withdraw said money Stromener must draw on Delafield at thirty days or more after sight, and that Delafield should allow interest at six per cent per annum.

"On 7th March, 1855, Delafield writes to Stromener: 'According to my anterior agreement, I have credited you with \$240, being interest for one year from 1st March, 1854, to 1st March, 1855, on the \$4,000 of yours which I have in my possession.'

"In 1856 or 1857, Stromener died at Jeremie. In the course of 1857, his death was known to Delafield, and familiarly spoken of by him. The paper which has been admitted to probate as his will bears date 18th January, 1856. No evidence is given that Stromener, in his lifetime, ever drew for the money, or any part of it, or for the interest credited on 1st March, 1855, or that any draft was ever made for it until plaintiff made such draft upon defendants on 26th January, 1876.

"I. It is claimed by defendants that the lapse of time (more than twenty years), from the time of the deposit affords a legal presumption of payment. It is not claimed, however, that action could have been maintained against Mr. Delafield until after a draft at thirty days' sight should have been dishonored; nor is it attempted to be shown, as matter of fact, that any such draft was drawn prior to that by plaintiff as administrator.

"Undoubtedly, as matter of reason, there is ground for arguing that where a contract or transaction has left it optional with a creditor at any time, by notice or other act, to make the debt due after a certain interval, it may just as well be presumed, after suitable lapse of time, that the notice has been given, and payment made, as payment alone may be presumed when debt is due without notice. But presumptions, like other limitations, do not depend upon the reasons applicable to a particular case. They depend solely upon authority, either of statute or of a course of judicial decisions; and upon authority, it is clear that presumption of payment arises only upon a lapse of time after the cause of action has accrued. The rule is so stated by the text-books (Greenleaf, Phillips) and its application is well illustrated in such cases as *Halden v. Crafts* (4 E. D. Smith, 490); *Baird v. Walker* (12 Barb., 298); *Sweet v. Irish*

(26 id., 467). *Payne v. Gardiner* (29 N. Y., 146) lays down the same rule, the judges only differing upon the question whether it applies to that particular case.

“The opinion of Judge WOODRUFF, in *Halden v. Crafts*, is an able vindication of the rule.

“II. Many of the authorities cited by counsel were to the effect that presumptions arising from lapse of time may be repelled by proof of circumstances explaining delay, as for instance, in 1 Starkie Nisi Prius Cases, 101, where plaintiff had resided abroad for the last twenty years, and it seems that such proof is admissible. But I have not specially considered that point, having come to the conclusion that presumption of payment did not attach in the present case.

“III. It is objected, by defendants’ counsel, that the paper proved as a will of Stromener is not a will within the meaning of 3 Revised Statutes, 152, section 68 (5th ed.).

“The sole requirement of that section for a will of personal estate executed by a person residing out of this State is, that it should be executed according to the laws of the State or country in which it was made.

“The laws of Hayti (Code Civil) have been put in evidence, and contain the following provisions :

“ART. 778. A will may be oligraphic, or made by public act, or in the mystic form.

“ART. 779. An oligraphic will shall not be valid unless it is written entirely, dated and signed by the hand of the testator. It is not subject to any other formality.’

“Afterwards, at section 813, the formalities for probate of such will in Hayti are prescribed.

“The will in question is quite informal, but its substance and meaning are clearly and simply testamentary. Can it be doubted that the identical paper, if executed in this State in the manner required by our statute, would be entitled to probate ?

“It is shown to have been executed according to the laws of Hayti, and duly admitted to probate there ; and an authenticated copy of the will and probate having been produced before the surrogate of New York, he has adjudged and decreed that the will had been *duly* admitted, that the copy had been *duly* authenticated, and that letters of administration should issue thereon.

"IV. But it is claimed that the surrogate had no jurisdiction to issue letters upon such will.

"The surrogate's jurisdiction does not depend in the least upon the will. He must have jurisdiction on other grounds, and then the statute requires the copy will to be presented to 'the surrogate having jurisdiction.'

"The ground of jurisdiction here is a plain one, that the decedent left assets within this county. If defendants deny that fact because the claim against Mr. Delafield may be invalid, that would be a mere begging of the question. The claim itself, if made in good faith, is assets without reference to the final result of a suit upon it.

"V. In this view and for the purposes of this action, it can hardly be material whether the will is valid or not. Upon the single fact of a decedent having left assets in the county, the surrogate had jurisdiction, and the public administrator, in the absence of relatives, etc., was entitled to letters of administration. It makes no difference as to his powers whether they are issued with the will annexed or without. The difference is in the manner of distribution.

"VI. It would have been a shorter, and perhaps an equally proper and effectual mode of disposing of the fourth point of defendant's counsel, to say that, after all, the mode of appointment of plaintiff was not open to objection by defendants in this action.

"If this is a valid claim against their testator they will be abundantly protected in paying it to the plaintiff. (2 Edm. St., 80, § 47; 2 id., 82, § 56.)

"The letters of administration are sufficient evidence *prima facie* to establish plaintiff's representative capacity. (*Belden v. Meeker*, 47 N. Y., 310.)

"Payment to an administrator, duly appointed, is a bar to a second action, even though the intestate was not dead and appointment had been obtained by fraud. The decision of the surrogate that the requisite jurisdictional facts exist, is conclusive until regularly reversed or vacated, and will protect all innocent parties acting on the faith of it. (*Roderigas v. E. R. Savings Institution*, N. Y. Court of Appeals; reported in *American Law Register*, for April, 1876; 63 N. Y., 460.)

"VII. The statute (3 R. S. [5th ed.], p. 157, § 22) makes no such

limitation upon the authority of an administrator with the will annexed as is claimed in the brief of defendant's counsel.

"On the contrary, it is the obvious duty of any executor or administrator to collect and administer the entire personal estate within his jurisdiction. Our statute specially regulates the distribution of the surplus after all the requirements of the will are satisfied. (2 R. S. [1st ed.], 96, § 75.) The whole system of our statutes is inconsistent with the theory that the powers of an executor or administrator with the will annexed, are limited to fulfilling the requirements of the will. The same principle and practice prevail in other States. (*Parris v. Cobb*, 5 Richardson's Eq., 450; *Hays v. Jackson*, 6 Mass., 149.)

"VIII. A question of detail remains as to the exact amount of plaintiff's recovery. What was the effect, if any, of Mr. Delafield's letter of March 7, 1855, informing Stromener that he had credited him with \$240, being interest for one year, to 1st of March, 1855, on the \$4,000, in the absence, so far as appears, of any answer from Stromener?

"Was it added to the principal, so as itself to bear interest? I think not. If Stromener had chosen to call for payment of interest at any time I suppose he would have been entitled to it on demand, and Mr. Delafield had expressly refused to allow interest on any sum payable on demand.

"Did that letter have the effect of separating the \$240 from the principal and making it due, so that any statute of limitations might run against it? Apparently not. According to *Payne v. Gardner*, cited above, action could not have been maintained for that \$240 without previous demand, and the statute of limitations would not apply to it.

"On the whole, I am of opinion that the letter merely informed Stromener of an existing fact, and had no legal effect whatever; that the true principal sum is \$4,000, and that the interest incident to it runs from 24th February, 1854, at six per cent, and runs at that rate to the present time. When a contract calls for interest at less than the lawful rate, the same rate of interest continues after the debt becomes due, and until judgment. (*Miller v. Burroughs*, 4 Johns. Ch., 436; *Van Beuren v. Van Gaasbeck*, 4 Cowen, 496; *N. Y. L. and T. Co. v. Manning*, 3 Sandf. Ch. [m. p.], 58.)"

This opinion covers, with admirable ability and clearness, every important question raised upon the trial, or on this appeal, but one. A careful examination of the case has led us to the same conclusions reached by the referee in respect to the points considered by him; and it is unnecessary, for that reason, to do more than adopt his opinion as our own.

In respect to the question so elaborately and ably argued by the learned counsel for the appellant, whether a demand was necessary in this case, in order to set the statute of limitations in motion, we are of opinion that the question is disposed of by the case of *Payne v. Gardiner* (29 N. Y., 146), which holds, in substance, that a demand is necessary before action, in the case of a deposit with an individual who is not a banker, trustee or agent. But in this case, a demand was required by the express agreement between the parties; and the precise form of demand was specified by the agreement to be a draft at thirty or sixty days' sight. In such a case we see no reason to doubt that the defendant's testator could have protected himself against any action brought by the plaintiff's testator at any time prior to such demand. In respect to the presumption that such demand had been made, so that the statute commenced to run long enough before the beginning of this action to bar the recovery, it may be suggested, in addition to the reasons presented by the learned referee, that it does not appear in the case that any person was authorized to make the demand, from the time of the death of Stromener, in 1857, until the probate of his will before the courts of Hayti, in 1875. Upon such a state of facts it is very questionable whether the presumption of a demand has any ground to stand upon, notwithstanding the great lapse of time since the deposit of the money.

Under the case of *Roderigas v. East River Savings Institution* (63 N. Y., 460) the appellants will be fully protected in making payment of the demand to the respondent.

The judgment should be affirmed, with costs.

BRADY and DANIELS, JJ., concurred.

Judgment affirmed, with costs.

JAMES BUCHAN AND ROBERT C. BUCHAN, EXECUTORS,  
ETC., APPELLANTS, v. JAMES RINTOUL, EXECUTOR, ETC.,  
RESPONDENT.

*Executors and trustees — application for an accounting by, under 2 R. S., 92, § 52 — may be made by their co-trustee — power of surrogate of New York to order a reference to take such account — chap. 359 of 1870, sec. 6.*

Where a testator devises all the rest, residue and remainder of his estate to his executors, to carry out the trust created by his will, one of such executors may apply to the surrogate, under section 52 of 2 Revised Statutes (92), for an order requiring his co-executor to render and file an account as therein provided.

Where objections are filed by such applicant to the account rendered in pursuance of such an order, the surrogate of New York may, under section 6 of chapter 359 of 1870, appoint a referee to examine such account, and report thereon to him.

APPEAL from an order made by the surrogate of the county of New York, denying a motion made on behalf of the appellants herein, to set aside an order of reference made herein, and to dismiss the objections made by the respondent to the account rendered by the appellants, without hearing the same, on the ground that the said respondent had no standing in court.

*J. P. Fitch and A. De Witt Baldwin, for the appellants.*

*John L. Davenport, for the respondent.*

DAVIS, P. J. :

The appellants and respondent herein were by the last will and testament of Thomas B. Rich, and by a codicil thereto, appointed, together with his widow, executors and executrix of the will. By the residuary clause of the will the testator gave, devised and bequeathed to his executrix and executors all the rest, residue and remainder of his estate, real and personal, in trust, to receive the rents, issues and profits of said real estate, and to invest his personal estate at interest, and receive the interest and income thereof, and apply the whole of said rents, interest, profits and income to the use of his wife, for and during her natural life, and on her decease

to divide the estate, real and personal, into two equal parts or shares, and convey or assign and deliver such shares as specially directed in said residuary clause.

The respondent and the appellants all qualified as such executors, but the appellants have had the control and management of the estate. At the expiration of eighteen months after their appointment, the executors having filed no account as required by statute, the respondent made application by petition to the surrogate for an order requiring such account to be filed. The surrogate made such an order and in obedience the appellants filed an account on oath, and subsequently a further account, amending the first in some particulars. The respondent filed objections thereto and the surrogate made an order referring the account for examination to an auditor, with instructions to the auditor to proceed to a hearing and to audit said account, upon notice to be given to the several parties. Afterwards the several legatees under the will intervened and appeared by counsel, and a motion was made on behalf of the present appellants and the *cestui que trust* under the will, to set aside the order of reference to the auditor, and to dismiss the objections filed by the respondent without hearing the same. This motion was denied by the surrogate, and the present appeal is from the order of denial. The questions made upon the appeal are, first, whether the respondent occupied such a relation to the estate that he had a right under the statute to intervene and require an account to be rendered? The statute provides that an executor or administrator after the expiration of eighteen months from the time of his appointment may be required to render an account of his proceedings by an order of the surrogate, to be granted upon application from some person having a demand against the personal estate of the deceased, whether as creditor, legatee or next of kin, or some person representing any minor having such claim. (2 R. S., 92, § 52.) It is insisted that an executor cannot move under this statute for an accounting by his co-executors, because he is not a person having a demand against the personal estate of the deceased, either as creditor, legatee or next of kin, as required by the statute above quoted. But the respondent did not occupy the naked relation of executor in this case. He was, by the residuary clause, made one of the trustees of the entire residuary estate of the decedent, both real and per-



sonal. His petition to the surrogate for an order of accounting describes him as one of the trustees named in the last will of Thomas B. Rich, deceased. All the residue of the testator's estate, after payment of specific legacies was given, devised and bequeathed to the executors, as trustees. For the purposes of the trust they took the legal title, and in our opinion, come fairly within the description of the persons in the fifty-second section of the act above cited, upon whose application the surrogate may order the executors to render an account of their proceedings after the lapse of eighteen months. Whether a mere executor can do this or not, it is not necessary for us to consider, for in our opinion, it is quite clear that such a trustee as the respondent in this case is, may properly proceed to require the rendition of an account by his co-executors who are in possession and control of the estate, although he is also an executor. The learned surrogate examined the question whether an executor may proceed against his co-executors, and he came to the conclusion that in such a case the proceeding would be regular. His views seem to be sustained by the authorities cited by him. The second question is, whether upon the rendition by the executors of an account of their proceedings under oath, the surrogate had power to make, upon objections interposed by the respondent, the order of reference to an auditor which the appellants and legatees moved to set aside. It is obvious that the account to be rendered under section 52 of the statute above quoted is not a final accounting by the executors. Section 54 of the same statute provides what may be done by an executor upon the rendition of this account; and that he may be examined on oath touching the payments made by him, and also touching any property or effects of the deceased which may have come to his hands and the disposition thereof. The petition of the respondent asked no relief whatever, except that the appellants appear and render an account under oath of their proceedings as executors, and it is insisted that, upon the rendition of such account pursuant to the prayer of the petition, the surrogate had no power to proceed beyond the examination of the executors on oath, as provided in the fifty-fourth section, without an application by the executors for a final settlement, under section 60 of the statute, or an application by creditors of the estate for payment of debts owing to them, and that his power to appoint an auditor under section 64

(2 R. S., 94), is limited to proceedings on final settlement of the estate or upon proper application for that purpose. This question has been distinctly raised and carefully examined in two cases, first in *Westervelt, Exr., etc., v. Gregg* (1 Barb., Ch., 469), in which the learned chancellor examined the question and the several statutes in relation to the duties of executors and administrators in rendering accounts and making distributions, and he came to the conclusion that where the petition asked no relief whatever, general or specific, except that the executors might be ordered to render an account according to law, and that prayer having been fully complied with, that the jurisdiction of the surrogate under the same was exhausted, and that he had no authority to proceed to appoint an auditor upon the rendition of such an account. In *Campbell v. Bruen* (1 Bradf., 224), the learned surrogate held that where an executor or administrator, in compliance with a citation to account, issued on the petition of a creditor, or legatee, or distributee, has rendered his account and submitted to an examination on oath, that terminates the proceeding, unless the executor asks for a final accounting, or the party who has applied for the account has also applied for the payment of his demand. In either of the two cases first named, the surrogate may proceed to settle the account. In this case no proceedings for a final settlement have been instituted, either on the application of the executors or on the petition of a creditor, or of the respondent. All that was prayed for was a rendering of the account required by the fifty-second section of the statute above quoted, and all that is intended by the reference to the auditor and the subsequent proceedings is to ascertain the correctness of that account. It is not to be presumed that the auditor or referee will go beyond the duty imposed upon him. This was, by the Revised Statutes, to be accomplished by the surrogate himself under the provisions of the fifty-fourth section. But we are of opinion that these provisions of the Revised Statutes have been changed, so far as they relate to the surrogate of the city and county of New York, by chapter 359 of the Laws of 1870. The sixth section of that chapter is as follows: "In any accounting of the said Surrogate's Court, or in any other proceeding therein, the surrogate may appoint a referee to take testimony as to the facts in relation thereto, to examine the accounts rendered to said surrogate, to hear and deter-

mine all disputed claims and other matters relating to said accounts, and to make report thereon, subject to the confirmation of the surrogate. Such referee shall have the same powers and compensation as referees appointed by the Supreme Court." This section confers upon the surrogate all the power that he exercised in making the order, and the fact that the referee in the case is called an auditor, instead of a referee, can make no difference in the power to appoint him. This statute seemed to have been overlooked in the court below and upon the argument before us, but we regard it as changing the power of the surrogate, so far as relates to the city of New York, over the accounting sought for in this case, and as fully authorizing the order of reference, if in the judgment of the surrogate it was deemed proper. There can, it seems to us, be no doubt that the respondent in this case is within the provision of the statute defining who may appear and contest an account.

That language is (2 R. S., 94, § 63): "Any creditors, legatees or other persons interested in the estate of the deceased, as next of kin or otherwise, may attend the settlement of such account and contest the same." By that section, both as executor and trustee, the respondent is interested in the estate, and is empowered to attend and contest the estate.

The order below, therefore, must be affirmed with costs.

BRADY and DANIELS, JJ., concurred.

Order affirmed, with costs.

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EDWIN F. WIGGIN AND EBEN F. BACON, ASSIGNEES, ETC.,  
RESPONDENTS, v. SHERMAN D. PHELPS AND WILLIAM  
O. DOUGLASS, APPELLANTS.

*Venue — change of, for convenience of witnesses — when granted.*

When, upon a motion to change the place of trial, the defendant swears to nineteen witnesses residing in another county, all of whom are sworn to be material, and the plaintiff swears to no witnesses residing in the county where the venue is laid, but simply sets forth, in his affidavit, facts tending to show that the defense, sought to be established by defendant's witnesses has no real existence, the motion should be granted.

APPEAL from an order made at Special Term, denying a motion to change the place of trial.

*T. C. Cronin*, for the appellants.

*Miles Beach*, for the respondents.

DAVIS, P. J. :

This is an appeal from an order denying motion of the defendants to change the place of trial from the city and county of New York to the county of Broome.

The defendants' affidavit shows that the cause of action arose in the county of Broome, and that the defendants have nineteen witnesses residing in that county, all of whom are sworn to be material, and the facts expected to be proved by each of them are set forth.

The plaintiffs swore to no witnesses residing in the city and county of New York, but presented an affidavit touching the merits of the action, and of the defense, tending strongly to show that no such defense or counter-claim as that set up by the defendants, in fact exists. To retain the place of trial, the plaintiffs should have shown some witnesses residing in the city of New York, and their failure to do so left it necessary for the court below to dispose of the motion solely by a partial trial of the merits of the action upon the *ex parte* affidavits presented by the plaintiffs.

It is claimed that upon the facts shown, to wit, that a large number of witnesses for the defendant resided in the county of Broome, and in the absence of any affidavit of witnesses residing in New York, it was a substantial right of the defendant to have the place of trial changed, and that the court below erred in denying the motion upon the supposed merits of the action and defense, as presented by the *ex parte* affidavits of the plaintiffs.

We are inclined to think this view the proper one. It was the established practice, under the old system, to grant motions of this kind, unless the plaintiff showed an equal or greater number of witnesses in the county where the venue was laid.

Afterwards the court, by its rules, allowed the parties to state the facts expected to be proved by the respective witnesses. This opened the question of the materiality of the witnesses to the consideration of the court, without regard to the numbers stated ; but it has never

FIRST DEPARTMENT, MARCH TERM, 1877.

been the practice to allow the plaintiff to retain his venue, where the defendant swears to witnesses residing in another county, by alleging facts in his affidavit tending to show that the defense, expected to be established by such witnesses, has no real existence. It is manifest, if this practice be introduced, that in this kind of motions the court will be called to pass upon the merits of the issues, irrespective of the convenience of witnesses which is really the proper subject of consideration. Of course, where the facts show that the motion is made in bad faith the court may properly deny it, and in determining that question may undoubtedly take into consideration the question whether any substantial defense exists; but the conclusion as to bad faith ought not to be left to depend wholly upon the partial trial of the action upon the *ex parte* affidavits of the plaintiffs. We think, upon all the papers presented, the defendants showed a substantial right to change the place of trial, and that such right was not met or impugned, according to the established practice. We do not intend to hold that orders made in this class of motions upon conflicting affidavits as to the convenience of witnesses, are appealable. The motion should have been granted.

The order below should be reversed, and the motion granted, with ten dollars costs of motion below, and ten dollars costs and disbursements of this appeal, to abide the event of the action.

BRADY and DANIELS, JJ., concurred in the result.

Ordered accordingly.

MARY LOUISE COLT, APPELLANT, v. ELEANOR HEARD,  
ADMINISTRATRIX, ETC., OF THOMAS SCOTT, DECEASED,  
RESPONDENT.

10	189
182a	12
10	189
69	54
10	189
84	127

*Will — absolute legacy to one — remainder to another, if the property be not disposed of by first legatee — construction of.*

A testatrix, by her will, devised and bequeathed all the rest, residue and remainder of her estate "unto my beloved husband, Thomas Scott, but such part thereof as he may have at the time of his decease, I give, devise and bequeath unto my niece, Mary Louise Ledyard, and my nephew, Guy Carlton Ledyard." *Held*, that the husband took an estate for life in the property described in the will,

with power to sell and dispose of the same, so far as necessary to secure to himself the full beneficial enjoyment thereof, and that the nephew and niece were entitled to what might remain undisposed of by him at the time of his death.

APPEAL from an order of the surrogate of the county of New York, granting letters of administration, with the will annexed, upon the estate of Catharine Louise Scott, to Eleanor Heard, in her right as administratrix of the estate of Thomas Scott, deceased, and denying the application of Mary Louise Colt, formerly Mary Louise Ledyard, for such letters of administration.

*Lucius C. Ashley*, for the appellant. Thomas Scott took the entire fee simple by force of the word estate, and the subsequent limitation being repugnant thereto, is void. (*Jackson v. Robins*, 16 Johns., 537; *Pinckney v. Pinckney*, 1 Bradf., 271; *Jackson v. Bull*, 10 Johns., 18; *McLean v. McDonald*, 2 Barb., 534; *Norris v. Beyea*, 13 N. Y., 286; Fearn on Ex. Dev., 50; 6 Cruise's Dig., 369, tit. Dev., chap. 17, § 14; *Pells v. Brown*, Croke Jac., 590; *Preston v. Tennell*, Willes' R., 164.)

*Charles Matthews*, for the respondent.

DANIELS, J. :

The propriety of the order appealed from depends upon the construction which should be given to the will of Catharine Louise Scott, so far as it disposed of her residuary estate; and for the purpose of ascertaining what that should be, the third clause of the will alone requires consideration. Beyond that, there is nothing contained in the instrument which will afford any material assistance in the determination of the intention of the testatrix concerning this portion of her estate.

The third clause was expressed by her in the following terms: "I give and bequeath and give and devise all the rest, residue and remainder of my estate, real and personal, and wheresoever situate, unto my beloved husband, Thomas Scott; but such part thereof as he may have at the time of his decease, I give, devise and bequeath unto my niece, Mary Louise Ledyard, my nephew, Guy Carlton Ledyard." If the husband took the entire title to the residuary estate

of the testatrix under, it then the order made by the surrogate was correct. But if he did not, and the limitation over upon his decease was valid, then the order should have directed the letters, with the will annexed, to have issued to the appellant, who is the person named as Mary Louise Ledyard. That the testatrix anticipated her husband would have some portion of the estate left at the time of his decease, which would then be subject to her power of disposition, is evident from the declaration made by her concerning it; and that is not consistent with the existence of an intention to make him the absolute owner of the residue of her estate. If that had been her purpose, then, clearly, she would have provided for no further disposition of her property. The fact that she made such a provision indicates that she did not understand that she had given him her entire residuary estate. What appears to have been her intention was, to give him her real and personal property for the term of his life, with power to consume or dispose of it as that might become expedient or necessary to secure him its beneficial enjoyment. And when those objects were subserved, that the final residue should still be subject to her disposition and control, and become the property of her nephew and niece in the manner ultimately declared by her will. The probability of the existence of this intention is advanced by the fact, that she would naturally be more desirous that her own family relatives should in the end enjoy her estate than that it should pass to those of her deceased husband. Her design was, that he should have the benefit of her property while he lived, and at his decease that it should return again to her own immediate relatives. And as that was clearly her intention, it ought to be maintained by the courts, if that can be done consistently with the established principles of law. As far as it may be done, her intention, as it may be capable of being discovered from her will, should be carried into effect.

In this case the testatrix's design, as she has disclosed it, can be supported and enforced under the authorities applicable to it; for, in cases quite similar, the limitation over after the termination of the life of the party first intended to be provided for has been maintained. This was accomplished upon a full examination of the authorities in the case of *Smith v. Bell* (6 Peters, 68). The clause which was there the subject of consideration was in the following terms: "I give to

my wife, Elizabeth Goodwin, all my personal estate, whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies and funeral expenses, which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal, absolutely; the remainder of the said estate, after her decease, to be for the use of the said Jesse Goodwin." The interest given by this clause to the wife of the testator was described in terms more consistent with the complete disposition of his personal estate in her favor, than those used in the instrument now before the court, and yet it was held that she took but an estate for life. In the course of his opinion upon which that case was decided, MARSHALL, chief justice, said that "these words give the remainder of the estate, after his wife's decease, to the son, with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator to make a future provision for his son, as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same as if the last member of the sentence were stricken out. Yet both clauses are equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will. We are no more at liberty to disregard the last member of the sentence than the first. No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole." (Id., 76.) In *Terry v. Wiggins* (47 N. Y., 512) the residuary clause was couched in terms equally as broad and comprehensive. By that the testator declared his purpose in the following form: "Also, I hereby bequeath to my said wife, Hannah Youngs, all other real and personal estate and effects that I may die possessed of, for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same, in part or in the whole, if she should require it or deem it expedient so to do; save and except the sum of \$500, which I shall intrust to her to appropriate according to verbal instructions from me. And after her decease, I hereby authorize my executors, hereinafter named,



to invest whatever residue there may be of personal or real estate and effects in the hands of the trustees of the Congregational Society of Greenport aforesaid, to be by them placed out on good legal security, and the interest to be by them appropriated yearly to the support of preaching the gospel," etc. And it was held that the wife took but a life estate, with a power of disposition only, and consequently the limitation over was valid, and should be sustained.

In the course of his opinion, which was that of the entire court, Judge ALLEN held that "there is no repugnancy in a general devise to one person, in terms which would ordinarily convey the whole estate, and a subsequent provision giving the same estate to another person upon the happening of a contingent event. Such a disposition of personal property has been held valid, and the limitation over good."

"By the will, the wife took an estate for life, for the residue, with remainder over at her death to the religious society, with power in the wife, during the continuance of the life estate, to defeat the remainder by an act authorized by the testator, to wit, a valid disposal of the subject-matter of the devise." (Id., 518, 519.) So far as it can be considered applicable to this controversy, *Barnes v Hathaway* (66 Barb., 452) sustains the same view; and neither *Marvin v. Smith* (56 id., 600) nor *Taggart v. Murray* (53 N. Y., 233) is in conflict with it. The authorities bearing upon the construction which should be given to the will in this case are entirely consistent with the reasonable import of the clause as it was framed by the testatrix; and both require that it should be so construed as to maintain the intention she has indicated; that is, that her husband should enjoy the full benefit which he could derive from her estate while he lived, and upon his decease that it should return to and be owned by her own family relatives. The order made by the surrogate was therefore erroneous, and it should be reversed with costs, and an order should be entered directing the letters of administration, with the will annexed, to be issued to Mary Louise Colt, the appellant.

DAVIS, P. J., and BRADY, J., concurred.

Order reversed, with costs; order entered directing letters of administration, with will annexed, to be issued to Mary Louise Colt, appellant.

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58	74
10	194
69	577
10	194
5a p 364	

JENNIE YOUNGS, RESPONDENT, v. HANNAH M. CARTER  
AND NETTA YOUNGS, IMPEADED WITH DANIEL S.  
YOUNGS, APPELLANTS.

10h — 194  
37 Mls\*732  
10h — 194  
d 78 AD\*100

*Equitable jurisdiction of Supreme Court — extent of — Const., art. 6, sec. 3 — Fraud — conveyance by one, with intent to defraud intended wife of dower — remedy of wife.*

The equitable jurisdiction of the Supreme Court includes all cases which may be properly comprehended within established and existing equitable principles. It is not necessary to establish the existence of some definite precedent for the action which is sought to be maintained.

One John Youngs, a widower, was engaged to be married to the plaintiff on the 27th of August, 1872, but in consequence of his sickness on that day the marriage was postponed to the third of September. On the thirtieth of August, he, without the knowledge of the plaintiff, conveyed real estate, of the value of \$150,000, comprising nearly the whole of his estate, to two daughters by a former marriage, and took back from them a lease of the same for his life.

After the marriage the plaintiff, upon learning that said conveyance had been made, brought this action to set the same aside. *Held*, that the conveyance was a fraud upon the rights of the wife; that the same should be adjudged void as to her inchoate right of dower, and that she should be adjudged entitled to a dower right in the land so conveyed.

*Held*, further, that she might maintain such action during the life of the husband.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action at Special Term.

*George W. Lord*, for the appellants. A court of equity cannot, by its decrees, supply "omissions" or "defects" in positive legislation, and do what the law-making power has left undone. (1 Story's Eq. Jur., §§ 14, 15, 16, 18, 19, 20 [7th ed.]; 1 Fonb. Eq. B., 1, § 3, note *h*; *Burgess v. Wheate*, 1 W. Black., 123; *Bond v. Hopkins*, S. & L., 428, 429; *Manning v. Manning*, 1 Johns. Ch., 530; 1 Mod., 307; *Cowper v. Cowper*, 2 P. Will., 753; Seld. Table Talk, tit. "Equity;" 3 Black. Comm., 432; Mitf. Plead. Eq., 4, note *b*.) A court of equity cannot, even in a case of extreme hardship, make a new statute or enlarge one already in existence. (3 Black. Com., 431; 1 Dane Abr. Ch., 9, art. 3, § 3; Story's Eq. Jur., § 15; 6 Paige, 292; 4 Johns. Ch. R., 149; *Head v. Stamford*, 3 P. Wms., 412; *Mayor, etc., v. Meserole*, 26 Wend., 139; *Supervisors, etc., v. Durant*, id., 65.) The settlement of a portion or of all a man's

estate upon his children in contemplation of a second marriage is not prohibited by our laws, nor does it operate as a fraud upon the marital rights of the wife. (1 Hill. on R. E. [4th ed.], 168, chap. 10, § 6; Park on Dower, 231, 236, 375, 382; Ath. on Mar. Set., 323, 329; Rop. on Hus. and Wife, 354 [note], 356; 1 Wash. on Real Prop., 161, § 13; Hov. on Frauds [vol. 2], 83; *Swamorck v. Lynford*, Co. Litt., 208; *Bottomly v. Fairfax*, Prec. Ch., 336; *Hill v. Adams*, 2 Atk., 20; *Banks v. Sutton*, 2 P. Wms., 700; Show Parl. Cases, 71; Draper's Case, 2 Freem., 69; Ambl., 6; 14 Ves., 290; *Stewart v. Stewart*, 5 Conn., 317; *McIntosh v. Ladd*, 1 Humph. [Tenn.], 459; *Richards v. Richards*, 11 id., 429; *Blood v. Blood*, 23 Pick., 80; *Thomas v. Davis*, 6 Ala., 113; *Cameron v. Cameron*, 10 S. & M. [Miss.], 394; *Whithead v. Mallory*, 4 Cush., 138; *Miller v. Wilson*, 15 Ohio, 116; *Link v. Edmonstone*, 19 Miss., 457; *Randall v. Randall*, 3 Mass., 378; *Baker v. Chase*, 6 Hill, 482; *Holmes v. Holmes*, 3 Paige, 363.) Fraud in such cases cannot be presumed. It must be proved. A settlement made in consideration of blood is never presumed to be fraudulent as against creditors or others. (*Bucklin v. Bucklin*, 1 Keyes, 141; *Frazer v. Wetmire*, 1 Barb. Ch., 220; *Swan v. Jackson*, 8 Cow., 406; *Loeschigk v. Addison*, 4 Abbt. [U. S.], 210; *Chatterton v. Gardner*, 11 Leigh, 281; *Freeghly v. Freeghly*, 7 Md., 538; *Reckets v. Reckets*, 4 Gill., 105; *Sangborn v. Lang*, 41 Md.; *Stewart v. Jackson*, 8 Cow., 496.) This action cannot be maintained during the lifetime of the husband. (*Moore v. The Mayor, etc.*, 8 N. Y., 110, 114.)

*William F. Shepard*, for the respondent. Any voluntary conveyance made by a man on the eve of marriage, and kept secret from the intended wife, is fraudulent and void as against her claim for dower. (*Swaine v. Perine*, 5 Johns, 482; *Smith v. Smith*, 2 Hal., 515; id., 6 N. J., 515; *Petty v. Petty*, 4 B. Mon. [Ky.], 215; *Thayer v. Thayer*, 14 Vt., 107; *Jenny v. Jenny*, 24 id., 324; *Cranson v. Cranson*, 4 Mich., 230; *London v. London*, 1 Humph., 1; *Brewer v. Connell*, 11 id., 500; Wash. on Real Prop. [3d ed., vol. 3], 298, 299.) That a voluntary conveyance or settlement made by an intended wife is a fraud upon the marital rights of the husband may be considered settled law.) *Pitt v. Hunt*, 1 Vern., 18; *Carlton v. Earl of Dorset*, 2 Vern., 17; *Howard v. Hooker*, 2 Ch. R., 82;

*Goddard v. Snow*, 1 Russ. R., 42; *Clancy on Husb., etc.*, 614.) The plaintiff is entitled to maintain this action before the death of her husband. (4 Kent Com., 50 [marg.]; *Mills v. Van Voorhies*, 20 N. Y., 412, 420; *Matthews v. Duryee*, 3 Abb. Ct. Ap. Dec., 220, 221; *Simar v. Canaday*, 53 N. Y., 298, 314.)

DANIELS, J. :

The plaintiff instituted this action as the wife of the defendant, Daniel S. Youngs, to annul and set aside a deed by which he conveyed nearly all his real estate to his two daughters four days before his intermarriage with her. By the evidence given, the conclusions of fact determined by the learned judge who presided at the trial were sufficiently sustained to render it the duty of this court, upon the present appeal, to regard them as expressive of the truth of the controversy between the parties. They show that the husband had been previously married, and the defendants appealing were the daughters of that marriage. After the death of their mother, their father contracted a second marriage with the plaintiff, which was to have been solemnized on the 27th day of August, 1872, but by reason of his illness at that time, it was deferred to the third of the following month. Intermediate those days, and on the thirtieth of August, he conveyed the real estate in question, of the value of about \$150,000 and comprising nearly all his property, to his two daughters, and they in turn executed and delivered to him a life lease of it. This was done without the knowledge of the plaintiff, who remained ignorant of what had transpired until after her marriage. When it was discovered by her, this action was commenced for the purpose already stated. And by the judgment recovered the conveyance was adjudged to be void as to the plaintiff's inchoate right of dower in the land on the ground of fraud, and she was adjudged to be entitled to such dower right in the property described in it.

It has been claimed, on behalf of the defendants appealing, that this court, as a court of equity, had no power to make the determination which resulted in the judgment, and several authorities were cited and relied upon in support of that proposition. But it will not become necessary to enter into any discussion of them for the purpose of making a proper disposition of this case; for even if it

should be conceded that the jurisdiction of the court cannot be enlarged by its own inherent authority, no practical difficulty could result from the concession; for it now extends to all cases of law and equity, by virtue of the provision of the Constitution defining its power. (Const. of 1846, art. 6, § 3.) The authority given, in terms is, "general jurisdiction in law and equity;" and that, of necessity, includes all cases which may be properly comprehended by established and existing equitable principles. The test of jurisdiction cannot be restricted to the existence of some definite precedent for the action which may be brought. That would destroy the flexibility required to maintain the utility of the court, in the demands necessarily made for the exercise of its authority in new cases always arising out of the enterprises and progress of society. The novelty of the case can form no well-founded objection to the jurisdiction over it, if it falls within the limits of any defined equitable principle. That must constitute the test of the court's authority, and not the existence or absence of precedent for the case over which it may be invoked. Those principles are as broad as the just wants and necessities of civilized society require; and it is scarcely possible to imagine a case in which equitable relief may be proper which they do not include. If there are cases of that description, the present one, certainly, is not among them in any view which should be taken of it. For if the plaintiff must fail it must be for want of proof, and not because of any infirmity in the power of the court to administer relief. If her case has been made out it is for the reason that the conveyance which was made was, in the sense in which the term is understood and applied by courts of equity, a fraud upon her contemplated marital rights. That has been defined to include all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. (1 Story's Eq. Jur., § 187; *Gale v. Gale*, 19 Barb., 249.) And a case of this description must be brought by the facts within this general principle in order to secure its success.

When the conveyance in controversy was executed, the relation of the grantor to the plaintiff was of a strictly confidential nature, and a natural expectation inspired as well as implied by it was, that

upon its consummation she should succeed to all the legal rights of a wife in the property owned by him. She acquired by means of it an equitable claim upon him to that extent. But, at the same time, it was not so entirely controlling as to prevent him from discharging such other equitable obligations as he might have previously incurred to his children. It simply restrained him from disposing of his property, fraudulently, for the purpose of preventing it from becoming subservient to the rights which the laws of the State secured to a wife. It has been substantially conceded in the argument, and has been so held in the early administration of the law by courts of equity, that a similar disposition of her property by the wife would be a fraud upon the marital rights of the husband, and for that reason would not be permitted to stand. But an effort was made to distinguish the case of a disposition of the husband's property from the operation of the same principle; and reasons were assigned for it more consonant to the spirit of the times than creditable to an impartial administration of the law. The wife's proprietary interests were then generally subordinated to the paramount rights of her husband, and her separate legal existence was, for most purposes, denied. But since then a more liberal policy has been adopted, which has afforded her a degree of security equal, at least, to that provided for her husband; and with its progress her contemplated marital rights have acquired an equal degree of security. There never was any good reason why the disability imposed in this respect upon the wife, should not have been equally applied to the conduct of the husband. If it was inequitable for her to convey away her property in anticipation of marriage, in order to prevent it from becoming subordinated to her husband's anticipated rights in it, it was equally so for him to do the same. The principle that restrained her should be equally as effectual over him; for, if the act of one was a fraud, it was certainly no less so when it was performed by the other.

• And so it has come to be regarded by courts of equity. The inchoate right of the wife to dower in her husband's property is considered, as it should be, as one entitled to protection. That has been held in general terms in repeated instances. (*Mills v. Van Voorhies*, 20 N. Y., 412; *Mathews v. Duryee*, 3 Abb. Ct. Appeals, 220; *Simar v. Canaday*, 53 N. Y., 298.) In the last case the author-

ities were fully reviewed and the conclusion adopted as the settled law, that "an inchoate right of dower in lands is a subsisting and valuable interest, which will be protected and preserved to her, and that she has a right of action to that end." (Id., 304.) And, conformably to that conclusion, the courts have protected her against conveyances made before marriage, for the purpose of placing the husband's property beyond the reach of that right. Its existence is one of the resulting consequences of marriage—a right arising out of its relation. And it is as much a fraud for the husband to place his property out of his hands for the purpose of avoiding it, as it is for a debtor who contemplates the contraction of debt, to voluntarily dispose of that owned by him, in order to defeat the efforts of future creditors to secure their payment. The latter, it has been held, cannot be successfully accomplished. (*Savage v. Murphy*, 34 N. Y., 508; *Case v. Phelps*, 39 id., 164.) And the same principle should maintain the action of the wife to vindicate herself against the success of a similar device. It has been applied in that manner in several instances, and expressly sanctioned in others. (*Smith v. Smith*, 2 Halst. [N. J. Chy. R.], 515; *Cranston v. Cranston*, 4 Mich., 230; *Swaine v. Perine*, 5 Johns. Ch., 482; *Thayer v. Thayer*, 14 Vermont, 107.) In the last of these cases the authorities were fully collected and reviewed; and it was held, as the wife during the treaty for marriage, would not be permitted, without the knowledge of the person intended to become her husband, to make a voluntary disposition of her property to defeat his marital rights, that the husband should be subjected to the same disability; and, accordingly, such a disposition of his property was not allowed to stand. This case is important, and entitled to great weight in disposing of the one now before the court. Substantially to the same effect, also, was the decision in *Petty v. Petty* (4 B. Monroe, 215). And they are not in conflict with *Holmes v. Holmes* (3 Paige, 363), which related only to the disposition of personal property, in which the wife can have no such interest as she has in her husband's real estate.

The conveyance in controversy in this case was what the law denominates a voluntary one (*Jackson v. Peck*, 4 Wend., 302); for it was not executed upon a valuable consideration, but it constituted a gift of the property described in it for the consideration of natu-

ral love and affection. And for that reason the grantees in it cannot be regarded as purchasers of the property conveyed to them for value. As to such a conveyance, the fraudulent intent of the grantor alone is sufficient to avoid it. (*Jenny v. Jenny*, 24 Verm., 324; *Wood v. Hunt*, 38 Barb., 302.)

And an action for that purpose may be maintained by the wife during the lifetime of her husband. (*Petty v. Petty*, *supra*; *Scribner on Dower*, vol. 2, 152.) If it could not be, her right would be in danger of being altogether defeated by a conveyance of the property by the grantees to a purchaser in good faith for value. The right itself arises from the marriage; and, according to *Swan v. Canaday* (*supra*), it then becomes sufficiently complete to render it the subject of vindication by action. In that respect it is analogous to the right of a creditor against the property of his debtor. Upon the solemnization and consummation of the marriage, her inchoate right to dower in her husband's real estate is brought into existence, and the only obstacle in the way of its attachment is the fraudulent conveyance made to avoid it. A present right of action for its removal at once accrues. The wrong has been done, and its vindication is an immediate necessity. Both together would seem to be sufficient to justify the maintainance of an action for the correction of the wrong.

The learned judge presiding at the trial was clearly warranted in concluding that the transaction was fraudulent. Making the conveyance, which included nearly all the grantor's property, for the purpose of defeating the right of his wife to be endowed of his property, gave it that character. And that it was made with that design, was reasonably apparent from its close proximity to the time of the marriage and the circumstance that he, at the same time, received back a life lease of the property, securing to him its rents and profits. The transaction was designed to secure him the benefit of his property while he lived, and to give it absolutely to his children upon his decease, free from dower in it to his wife. That was its inevitable result if it should prove successful; and for that reason it was properly held to have been intended and designed as the effect of the conveyance. The principle is a familiar one, frequently applied, that persons shall be presumed to have designed what may be the natural or necessary consequences of their acts;



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FIRST DEPARTMENT, MARCH TERM, 1877.

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and it is peculiarly applicable to cases depending upon the existence of an intent to defraud.

In all respects the action was well sustained by the evidence, and for the reasons already mentioned, as well as those assigned in the opinion delivered at the Special Term, the judgment, to which no formal objection has been taken, ought to be affirmed, with costs.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed, with costs.

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EMILIO SANCHEZ Y. DOLZ, RESPONDENT, v. NATHAN B. MORRIS, TIMOTHY KELLY AND OTHERS, APPELLANTS.

*Testimony of experts—form of questions—Tonnage of vessel given in charter-party—when not conclusive.*

Upon the trial of this action, brought to recover damages for a breach of a charter-party, the principal question was whether or not the ship, which had been disabled by a storm while near the port of Vera Cruz, could have put into any of the ports in the Gulf of Mexico or in the southern Atlantic States. Upon the trial, experts, called on behalf of the plaintiff, were asked, against the defendant's objection and exception, the following question: "Under the state of facts mentioned in that deposition what ports could the captain have made in the Gulf of Mexico?" They were also asked other questions to the same effect. *Held*, that it was error to admit the questions, as they allowed, and compelled each witness to determine for himself what facts were proved by the deposition, and thus usurp the functions of the jury.

The charter-party was made between J. L. Robart, master and agent for owners of brig Ottawa, "of the burden of one hundred and fifty-eight tons or thereabouts," and the plaintiff. In an action by the latter to recover for a breach of the contract, *held*, that he was entitled to show, for the purpose of enhancing the damages, that the brig was in reality of 250 tons burden.

APPEAL from a judgment in favor of the plaintiff, entered on the verdict of a jury, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

This action was brought to recover damages for a breach of a charter-party, entered into between "John L. Robart, master and

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FIRST DEPARTMENT, MARCH TERM, 1877.

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agent for the owners of the Br. brig *Ottawa*, of Parsboro, N. S., of the burden of one hundred and fifty-eight tons or thereabouts," and the plaintiff.

*Erastus Cooke*, for the appellants.

*William W. Goodrich*, for the respondent.

DANIELS, J.:

The action was brought to recover damages for the breach of a contract of charter-party, by which the brig *Ottawa* was chartered to the plaintiff to proceed from Rockland lake with a cargo of ice to Vera Cruz, and to take on board another cargo there or at some other safe port in Mexico, and return therewith to New York or Boston.

After discharging her outward cargo at Vera Cruz, the master of the vessel was directed to proceed to Tecohitla, not far from Vera Cruz, to receive the homeward cargo. On her way there and while awaiting the arrival of a pilot she encountered a severe storm, which drove her from the vicinity of that port, and as it was claimed in behalf of the defendants, her owners, so far disabled her as to render her nearly helpless and incapable of entering any port upon the coast for the purpose of refitting. The deposition of the master tended to support that view of the facts, and to show that the first harbor she was able to enter was Liverpool, in Nova Scotia.

She was then repaired and refitted and returned to New York, and the captain informed the plaintiff that he wished to continue the voyage, but was answered that there was then no cargo in Mexico for him. The vessel was then in a condition to go on and perform the remaining portion of the charter.

The defense in the case was predicated upon the evidence given by the master of the vessel, and the plaintiff endeavored to avoid the effect of it by showing by persons experienced in the navigation of the Gulf of Mexico and with the adjacent waters and harbors, that the vessel, by proper and skilful management, might have entered one of the ports along the route taken by her after being driven away from Tecohitla, where her injuries could have been repaired and she enabled to return for her homeward cargo. And

for that purpose certain questions were propounded to those witnesses, and answers received from them which are urged in the defendants' behalf as being so far improper as to require another trial of the action for their correction. If the evidence in this manner elicited was incompetent, then, as it appears to have been essential to the support of the plaintiff's case, the result indicated will necessarily follow from the allowance of its introduction upon the trial.

The evidence objected to consisted in part of the opinions of the plaintiff's witnesses, as to what might have been done with the vessel by the way of making a convenient harbor under the circumstances mentioned in the deposition. It has not been urged, as it could not be with any propriety, that the opinions of such witnesses may not be taken upon subjects connected with the science or practice of navigation. *Walsh v. Washington Ins. Co.* (32 N. Y., 427, 443). But the objection taken is that they were allowed to state their conclusions in terms so broad as to comprehend the province of the jury, as well as the subjects appearing to be within the legitimate scope of the rules of evidence.

The first of these inquiries relied upon as objectionable was made in the following form: "Under the state of facts mentioned in that deposition, what ports could the captain have made in the Gulf of Mexico?"

The objection to this in brief was that the question was improper, but the court overruled it and allowed the answer to be given. To that the defendants excepted, and the witness answered in the following words: "According to my opinion he could have made any of the ports from Galveston to Key West; Galveston, New Orleans, Mobile, Pensacola and Key West, the latter of which he could have made perfectly easy; there are quite a number of small ports he could have made, but those are the larger ports, which any captain is acquainted with." A similar inquiry was made of another witness. The question propounded for that purpose to him was as follows: "With a vessel in the condition stated by Captain Roberts, and these winds and currents as stated in that deposition, with a vessel in the position named by him, would there have been any difficulty in that vessel reaching other ports in the Gulf of Mexico?"

This was objected to because it involved "an inquiry into the

truth or falsity of at least some portion of that testimony," and called "upon the witness to pass upon the testimony of the person upon whose evidence he predicates his opinion." The objection was overruled and the defendants excepted. The witness thereupon answered, "I do not think there would be any difficulty at all in making the northern part of the bay out of the southward of Vera Cruz making Sisal from eastward, Frontaro, Minatiltain, Campeche, New Orleans, Mobile, Pensacola, Key West, Havana, Matanzas, Cardenas, any port in the United States, Savannah or Nassau."

A similar inquiry was made of a witness who heard part of the deposition read, and also read a portion himself. That was objected to because the question did not embody the entire condition of the vessel. It was disposed of in the same way as the other objections had previously been. And the witness answered that the vessel ought not, and generally would not have any trouble in making any Mexican ports to the westward of Pensacola.

These inquiries in the form in which they were allowed to be made do not seem to have been proper, and the impropriety of such a course of examination was plainly illustrated by the cross-examination of the witness answering the second of these questions.

For upon being asked whether he took the statements of Roberts as true, to form the basis of his opinion, he answered that he did not take any thing of his story at all, but thought he could have got a vessel into one of those ports according to his judgment.

As they were propounded, the questions required the several witnesses to gather the facts for themselves which each might regard as proved by the deposition. A finding of facts claimed to be established was first essential, but without any disclosure of them by the witness, his answer was taken embodying his conclusion upon them. What facts the witness might consider proven by the evidence he was required to decide for himself, and then express his opinion as to their effect. But what that was founded upon could not possibly be known when the answer was given by him. Diversities of views would ordinarily be entertained by different persons under such circumstances. One might very well and very naturally accept as proved what another would as surely reject. That would be the result of the peculiar constitution of the human mind and the experiences of different persons. And it would create different bases for similar

answers. Without confining the attention to any certain state of supposed or supposable facts, each witness was allowed to answer upon what he alone considered to be the effect of the deposition of the captain. He was placed at liberty to construe it for himself and then permitted to declare his opinion upon that construction.

In effect the entire scope of the defendants' defense was placed under the inspection of the witness, and he was allowed to state whether in his judgment the defense had been established. The witness was in this manner permitted to usurp the province of the jury and in part, that of the court. The course pursued has not been sanctioned by authority, and must have been injurious to whatever rights the defendants had in the case.

The true course to be taken is that indicated by Judge ALLEN in his opinion, in the case of *Filer v. The New York Central R. R. Co.* (49 N. Y., 42), where it was said that "some latitude must necessarily be given in the examination of medical experts and in the propounding of hypothetical questions for their opinions, the better to enable the jury to pass upon the questions submitted to them. The opinion is the opinion of the expert, and if the facts are found by the jury as the counsel by his questions assumes them to be, the opinion may have some weight; otherwise, not. It is the privilege of the counsel in such cases to assume within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed." (Id., 46.)

Upon an examination conducted in that manner, the court and jury can see what the opinion has been based upon, and proper effect can be given to it accordingly. If the facts assumed are not found as established by the jury, then the opinion will be deprived of all weight in the case; but if they are found, then appropriate effect will necessarily be awarded to it, and the opinion given will aid the jury in solving the controversy. That cannot be the case where the witness may be allowed to roam through the evidence for himself, and gather the facts as he may consider them to have been proved, and then state his conclusion concerning them. The uncertainty of the judgment of the witness as to the effect of the proof must render his opinion upon it alike uncertain, when that is allowed to be given.

Whether it would be adapted to the case or the defense as the

jury might consider it to have been established in their view of the evidence, there would be no possible mode of determining. If such an opinion as was allowed to be given in this case were to be followed at all, it could very well proceed upon the assumption of the truth of a different state of facts from that to which it would be finally applied by the jury.

And no such mode for the toleration of injustice could be devised.

In *Sills v. Brown* (9 Car. & P., 601), which was an action for a collision, the witness was asked whether, having heard the evidence in the cause, he thought the conduct of the captain of the brig was right or not. This was excluded as improper and the witness was limited in his answer to what he considered was the duty of her captain under certain specified circumstances. (See also *People v. Lake*, 2 Kernan, 358.) In the case of *The Clement* (2 Curtis, U. S. Rep., 363) a similar point was presented and decided in the same way. It was there said in the course of the opinion, that "a question was made at the hearing concerning the admissibility of the testimony of experts in answer to questions proposed to them, not on a given state of facts, but upon the depositions of the witnesses who were present at the collision. I am of opinion such evidence is not admissible." (Id., 369.) *Crofut v. Brooklyn Ferry Co.* (36 Barb., 201) and *Taylor v. Monnot* (4 Duer, 116) were decided upon a similar view of the law of evidence. In the form in which these questions were put upon the trial of this cause they should have been rejected.

The statement in the charter that the vessel was of the burthen of 158 tons or thereabouts was merely added for the purpose of completing the description given, in order to ascertain her identity. And it did not preclude the proof offered by the plaintiff to prove the extent of her carrying capacity, for the purpose of showing the damages sustained by him in consequence of the failure to perform the stipulations of the charter.

The verdict seems to have been for a greater sum than that which the evidence appeared to warrant. But as another trial of the action will be necessary because of the improper evidence already considered, a minute examination into the excess will not be required. That will be avoided if the plaintiff should recover another verdict against the defendants, by excluding from the recovery the benefits secured by

means of the performance of the outward voyage; and the expenses which would have been necessarily attendant upon the second, so far as the plaintiff would have been subjected to them, in case it had been performed according to the stipulations of the charter.

Both the order denying the motion for a new trial and the judgment should be reversed, and a new trial ordered with costs to the appellants, to abide the event.

DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed, new trial ordered, costs to abide event.

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THE PEOPLE *EX REL.* JAMES W. SMITH *v.* THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY OF NEW YORK.

PEOPLE *EX REL.* WILLIAM R. RENWICK *v.* THE SAME.

*Taxation — what subject to — “land” — meaning of.*

Certain lots under water were conveyed to the relator's grantor by the city of New York, the conveyance reserving therefrom so much thereof as formed part of Stanton street, “for the use and purpose of public streets and highways,” the grantee covenanting to build a wharf on that portion reserved for Stanton street, and keep the same in good repair, and that the same should always be used as a public wharf, he to have and enjoy all wharfage, crannage, benefits and advantages growing or arising from the wharf so erected. *Held*, that the interest of the grantee in the wharf so erected was “land,” within the meaning of that term as used in the statutes of this State relating to taxation, and was properly assessed as such thereunder.

CERTIORARI to review the proceedings of the commissioners of taxes and assessments of the city of New York, in assessing certain property belonging to the relator.

*E. O. Andrews*, for the relator. The land upon which the pier is built belongs to the mayor, etc., being part of one of their streets. The pier, though built by Smith, belongs to the mayor, etc., being attached to their realty. Being their own property, it is not taxable. (Dillon, *Munic. Corp.*, vol. 2 [2d ed.], § 614; Cooley on

Taxation, 130.) What property the relator has here is an exclusive and perpetual right to go upon the pier, it being part of a public street, to receive wharfage from persons using the pier. This is not land or real estate or personal property. It is a franchise, an incorporeal hereditament. (*Boreel v. The Mayor*, 2 Sandf., 552; 3 Kent's Com., 458, 459; *De Witt v. Hays*, 2 Cal., 468.) Being neither land nor personal property, the relator's franchise was not liable to taxation. (*Boreel v. The Mayor*, 2 Sandf., 552; *De Witt v. Hays*, 2 Cal., 468.)

Wm. C. Whitney, for the respondents.

DANIELS, J.;

In 1852, the mayor, etc., of the city of New York conveyed a water lot, or land under the water of the East river, to William Smith and Milton G. Smith. It was described by metes and bounds in the deeds, subject to the reservation of so much of the premises as formed parts of East and Stanton streets "for the use and purposes of public streets and highways," to be extended through the premises conveyed. The deed contained "a covenant, on the part of the grantees, that they, their heirs and assigns, would build, on the requisition of the said mayor, aldermen and commonalty, such wharfs or piers on that part of Stanton and East streets as should be directed, and keep them at all times thereafter in good order and repair, and that the same should always be and be used as public wharfs." And the deed also contained a covenant, on the part of the corporation, that the parties of the second part (the said Smiths) their heirs and assigns, should and might, at all times thereafter, have and enjoy all wharfage, crannage, benefits and advantages growing or arising from the wharves so erected. William Smith afterwards acquired the rights of the other grantee in the premises, and erected the wharf on Stanton street, mentioned in the covenant, and he conveyed it to the relator by deed, dated on the 20th of June, 1866, "together with the privileges, advantages, hereditaments and appurtenances thereto belonging." His interest in the property was assessed by the respondents at the sum of \$4,000. To that he has objected that it is an interest not liable to taxation under the laws of this State.



While the wharf has been erected, and is maintained as a portion of a public street, it is evidently not for the general purposes of travel as other portions of the streets of the city are used, but for the use of persons having occasion to go upon it for the transaction of the business to which these structures are always devoted, and subject to that use of it. The wharf was designed for the mooring, lading and unlading of vessels, and for the transfer of property to and from them; and, by the deed made conveying the land, the right and privilege of carrying on this business, upon and by means of the wharf, were conveyed to the grantees, their heirs and assigns, for their own benefit, profit and advantage. That gave them the substantial use and enjoyment of the property in perpetuity, subject only to the right of the public to pass on and off the wharf as a street. That was an exception or reservation of an important character; but it could not so far interfere with the grantee under the deed, as practically to impair his rights to have the land devoted to the maintenance of the wharf, or prevent him from enjoying all the advantages and emoluments derived from that structure in its use as private property, for all the purposes to which it could be appropriately applied in carrying on commercial business. So far as the formal title was left in the city, it was subject to such burthens as constituted all the substantial elements which may be derived from the ownership of property; and under the terms of the statute that was sufficient to render such owner liable to taxation on account of it. The provisions made upon that subject were evidently designed to include every species of real and personal property. (*Barlow v. St. Nicholas Bank*, 63 N. Y., 399, 406.) For it was declared that "all lands and all personal estate within this State, whether owned by individuals or corporations, shall be liable to taxation," subject to certain exemptions not requiring special consideration, because they are not particularly applicable to this case. And the term "land," it was provided, "shall be construed to include the land itself, all buildings and other articles erected upon or affixed to the same, all trees and underwood growing thereon," etc. (1 R. S. [5th ed.], 905, §§ 1, 3.) The wharf was erected upon and affixed to the soil, within the import of these terms as they were used in this statute; and the relator was its substantial owner. The privileges secured to him were such as could

be only created by deed, and he derived his right to their enjoyment by an instrument of that description. They were supported by an interest in the land constituting a right to have it devoted to the purposes mentioned in the original deed, and they rendered him the beneficial owner of it. Property devoted to the ordinary pursuits of business cannot usually be more completely subject to the use and profit of the owner than this was rendered. The substantial advantages which can be secured from the land have been conveyed to him; and his interest in it is very nearly equivalent to that of the absolute owner. It was not personal property in any sense of that term, and still it was as surely property. It depended upon and issued out of the land, and constituted an interest in it of a most valuable nature. For that reason, it was a part of the land, and within the meaning of that term as it was used in the statute declaring what should be the subjects of taxation.

Under somewhat analogous circumstances, the right of a railway company to maintain and operate a railway over the lands of the Seneca Nation of Indians, and to which it could acquire no title, was held to be taxable in *People v. Beardsley* (52 Barb., 105). And that was afterwards affirmed by the Court of Appeals. The same conclusion was adopted concerning the interests which a street railway company acquired in certain streets by the construction of a street railway over them in the case of *The People v. Cassity* (2 Lans., 294). The subject was fully examined at that time, and a repetition of what was then said upon it, and the authorities relating to it, will, for that reason, be unnecessary on the present occasion. That case was taken to the Court of Appeals and the liability of the interest of the company to taxation as land was affirmed. (46 N. Y., 46.) And these authorities, in principle, sustain the liability of the relator to taxation on account of this property.

In the case of *Boreel v. Mayor, etc.* (2 Sandf., 552), this subject was considered, and the conclusion adopted that the interest of the grantee in the property was not liable to taxation. But as the point was not actually presented by the facts at that time before the court, and a more enlarged construction than was then considered proper has been since placed on the term "land," as it has been used in the statute, this authority should not be accepted as control-

FIRST DEPARTMENT, MARCH TERM, 1877.

ling in this instance. If it should be, then, as it was there held, all incorporeal hereditaments must escape taxation, and that could not have been the legislative design in the enactment of the law. The intention on the other hand was, that the term "land" should be understood as including whatever was properly comprehended by it; and incorporeal hereditaments constitute a part of that subject-matter. The exceptions and exemptions contained in the statute also support this conclusion, for they exhibit the existence of a design to specifically enumerate all that should not be rendered subject to taxation, and interests of this nature are within neither of the exemptions. By excepting the property they relate to, it was apparently intended that the statute should be understood as subjecting all other property and interests to the burthens of taxation; and justice to other property owners, and to the public, is in favor of that construction.

The case of *People ex rel. Renwick*, submitted with this one, presents only the point already considered, and does not require any further examination for the purpose of determining the disposition which should be made of it. In that, as well as the case of *Smith*, the action of the respondents should be affirmed, with costs.

DAVIS, P. J., concurred.

Present — DAVIS, P. J., BRADY and DANIELS, JJ.

Proceedings affirmed.

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ROSA B. PHILLIPS, RESPONDENT, v. HENRY B. MELVILLE,  
APPELLANT.

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*Reversal of action by executrix — right of action shown to be in her individually — power of court to amend pleadings upon the trial — Form of verdict and judgment in action for recovery of personal property — Code, § 277.*

After issue joined in an action, brought to recover the possession of personal property, the plaintiff died, and thereafter the action was revived in the name of his widow as his executrix. Upon the trial it appeared that the husband had no title to the property, but that the same was owned by the wife in her own right. *Held*, that the court had no power to amend the summons and complaint

by striking out the word "executrix," and thus allow the plaintiff to recover by virtue of her own title to the property.

In an action to recover the possession of personal property, which has not been delivered to the plaintiff, the jury should assess the value of the property and damages for its detention, and not simply find a general verdict for damages; and the judgment in such a case should be for the recovery of the property, or the value thereof in case a delivery could not be had, together with damages for its detention.

APPEAL from a judgment in favor of the plaintiff, entered on the verdict of a jury, and from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

*Benj. F. Carpenter*, for the appellant.

*A. K. Hadley*, for the respondent.

DANIELS, J. :

This action was brought to recover the possession of personal property alleged to be wrongfully withheld by the defendant. It was commenced in the name of Augustus E. Phillips, as plaintiff, who, in his own right, claimed the recovery of the property. He died after issue was joined, and on motion made for that purpose the action was by order revived in favor of his widow, the present plaintiff, as his executrix. Upon the trial the evidence tended to show that the property belonged to her in her own right, and that her husband had no interest in it. The court thereupon, on her motion, struck out the term executrix, which made the action a suit in her favor personally, and in that form it was allowed to be maintained. The defendant excepted to the decision allowing this change in the action, and that exception is relied upon in support of the present appeal. According to the order which was made for its revival, the action was revived only in the plaintiff's favor as the executrix of her husband's estate, and it was consequently in his right that she was allowed under that to continue and prosecute it. She then claimed no other transfer of the interest in it, and for that reason no other relief could be awarded to her under the provision allowing the revival of actions commenced by parties, afterward deceased. (Code, § 121.)

Upon the trial it appeared that the deceased plaintiff had no interest in the property sought to be recovered. For that reason she could not succeed in the action as his executrix. And when that appeared, the form of the proceeding underwent a further change, by which it was converted into an action in her own favor individually. This introduced a new right into the case wholly inconsistent with that on which it had previously proceeded. Instead of being prosecuted, as it was commenced, to vindicate the right of her husband to the property, it was from that time carried on to maintain her right to the property. That made it a new action, distinct and separate from the manner in which it had been commenced by the deceased plaintiff. It no longer depended upon his rights, but was based solely upon her own. This presented the case of a failure of proof, and not a variance. The allegation which had been originally made as the foundation of the case was left unproved in its entire scope and meaning, and for that reason the defect which the evidence developed could not be amended or corrected, as this was on the trial of the action. (Code, § 171.)

The change permitted made a new action, and that could not be done by the court at the trial. (*Whitcomb v. Hungerford*, 42 Barb., 178; *Bush v. Tilley*, 49 id., 600; *Ford v. Ford*, 53 id., 525.)

The property was not delivered to the plaintiff in the action, and the only verdict in the case was one for damages. That was not in the form which the law has required to be followed in this class of cases. The jury, in addition to finding for the plaintiff, should have assessed the value of the property and damages for its detention, instead of simply and solely finding a general verdict for damages. (Code, § 261.)

The same error was followed in the entry of the judgment, which was for the recovery of the damages, and not as it should have been for the recovery of the property or the value thereof in case a delivery of possession could not be had, with damages for its detention, by the defendant. (Code, § 277; *Dwight v. Enos*, 5 Seld., 470.) In this case it was held that where "a plaintiff in this species of action is already in possession of the property, if he succeeds in the suit he merely takes a judgment to confirm his possession, and for his damages and costs; but in case he has not obtained possession, he should take a judgment in the alternative that he

recover the possession, and that the goods be delivered to him, etc., or that he recover the value thereof, specifying such value as found by the jury, in case a delivery of the goods cannot be had, together with his damages, etc." (Id., 474.) And it was afterward further added by the learned judge who delivered the opinion of the court that he regarded it "as entirely clear that neither a plaintiff nor a defendant in an action to recover the possession of personal property can take judgment for the value of the property, except as an alternative." (Id., 476.)

For these reasons the judgment as well as the order denying the motion made for a new trial should be reversed and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed, new trial ordered, costs to abide event.

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RICHARD M. NICHOLS, APPELLANT, v. HENRIETTE  
NUSSBAUM AND OTHERS, RESPONDENTS.

*Usury—mortgage—sale of—Certificate of mortgagors—when it operates as an estoppel.*

Where a bond and mortgage, executed without any consideration moving from the mortgagee, are sold to a third person or placed in his hands for negotiation, upon a usurious agreement, and the same are subsequently sold to one who purchases the same, relying upon a certificate given by the mortgagors, which states that they were executed upon a full lawful and valid consideration, and that there was no defense thereto, or equities, latent or apparent, in any way affecting the same, the parties signing the said certificate are estopped thereby from setting up the invalidity of the bond and mortgage in an action brought by the purchaser to foreclose the same.

Where such certificate is signed by the mortgagors, without knowledge of and by reason of misrepresentations made in regard to its contents, they are not thereby estopped from setting up the invalidity of the mortgage.

Where the purchaser, at the time of the purchase, knows that the bond and mortgage are usurious and void, and that the statements contained in the certificate are untrue, he can derive no benefit or protection therefrom.

APPEAL from a judgment in favor of the defendants, entered upon the trial of this action by the court at Special Term.

*J. H. V. Arnold*, for the appellant.

*W. H. & D. M. Van Cott*, for the respondents.

DANIELS, J. :

The object of this action was the foreclosure of a mortgage executed by the defendants, Henriette Nussbaum and Philip Nussbaum, her husband, to William Katz, upon premises owned by her on One Hundred and Sixteenth street, in the city of New York. It was made to secure the payment of \$4,000, and accompanied a bond executed by the same persons. The evidence tended very decidedly to show that the bond and mortgage were made in form to the mortgagee named, simply for the purpose of being used to loan money upon them, and not for any debt owing to him. He accordingly, with the assent of the other parties to them, assigned them to Gustave A. Carris, who either purchased them himself or undertook to sell them for the parties by whom they had been executed. It is not important to the disposition of the appeal, to determine in what capacity he took the assignment of the bond and mortgage, because the plaintiff's rights are not wholly dependent upon his title to them. In form Carris was the assignee, and if he was the purchaser, as there is very good reason for supposing that he was, there can be no doubt that they were void for usury in his hands, for he acquired his title at a greater rate of interest than seven per cent, and as they were not made to secure any existing debt or obligation that rendered them usurious.

After he had acquired the title to them as he did, with a full knowledge of all the facts concerning their inception, a negotiation was entered into for their sale to the plaintiff. That was principally carried on through his attorneys. During its progress, and before the plaintiff bought the bond and mortgage, the mortgagors executed and in due form acknowledged a certificate stating, among other things, that they were executed and delivered for a full, lawful and valid consideration, and that there was no defense, off-set or counter-claim thereto, nor any equities, latent or apparent, whereby they could be in any manner impaired or affected. And evidence was given, tending to show that the plaintiff became the purchaser of the bond and mortgage, on the faith of this certificate, for the sum of \$3,520, but as they could not lawfully have been sold at this rate

of discount, the plaintiff's right to collect the debt secured by them, depended upon the validity and effect of this certificate. If that was given for the purpose of inducing the purchaser to believe that they were what it described them to be, and he, acting upon the faith of it, bought them at a rate of discount which would otherwise have been unlawful, the persons executing it would be precluded by means of it, from objecting to their collection on the ground of usury. It would then estop them from asserting the fact to be different from the representation made of it by them in the certificate, and for that reason would deprive them of the benefit they might otherwise have been entitled to derive from the statute regulating the rate of interest on the loan of money. (*L'Amoreux v. Visscher*, 2 Comst., 278; *Real Estate Trust Co. v. Seagreave*, 49 How., 489.)

But the answer made in the action by the defendants, who executed the bond and mortgage, was that they were void in the plaintiff's hands for usury; and evidence was given tending to show that the certificate was executed without knowledge of its contents, and by reason of misrepresentations made concerning it. If that were the fact, then, within the cases of *Wilcox v. Howell* (44 N. Y., 398) and *Dinkelspiel v. Franklin* (7 Hun, 339), it would not be operative, by way of estoppel, on the parties who in that manner had been induced to execute it. But the evidence on the part of the plaintiff was in decided conflict with that which the defendants gave upon this subject; and if it was to be relied upon, established the fact that the certificate was fully explained when it was presented for execution, and was subscribed with a complete knowledge of its contents.

The learned judge, before whom this cause was tried at the Special Term, did not specifically determine which was the correct view of the evidence on this point. He simply found that before the assignment was made to the plaintiff he sent a notary to visit the persons who executed the certificate, but whether they executed it understandingly, or were induced to do so because they were deceived as to its nature or contents, he did not decide. But he put his decision of the case in the defendants' favor upon another fact entirely, which was stated to have been found by him, that the plaintiff took the assignment of the bond and mortgage, "with the knowledge of the said corrupt and usurious agreement, and when the same was subject



to and rendered void thereby, and to cover up and conceal the same." This, of course, was decisive of the case, even if the certificate had been executed properly and with the most complete knowledge of its contents; for that would not afford the least protection to a purchaser of the bond and mortgage, who, at the time he bought them, knew that the statement in the certificate was untrue, and that the securities were infected with the vice of usury. Such a certificate will only protect persons dealing with the security mentioned in it, in good faith, believing the truth of the statement made by it, and relying upon it as the basis of the purchase. A person knowing the contrary can in no way be benefited by such an instrument; for that reason, if this conclusion were supported by the evidence, it would be wholly unimportant whether the certificate was intelligently executed or not. The bond and mortgage were found to be usurious in the hands of Carris, upon evidence fairly justifying that result, and if the plaintiff had purchased them, knowing that to be their character, they were equally void after the assignment to him.

But the difficulty with the case is, that there was no evidence whatever given upon the trial in any manner tending to show that the plaintiff knew of the usurious agreement made with Carris, or that he took the assignment to cover up or conceal such an agreement. The evidence was all the other way, showing that the purchase was made upon the faith of the certificate, and without knowledge of any usurious agreement existing between Carris and the parties who executed the bond and mortgage. The learned judge probably subscribed the conclusions of fact as well as law, without examination, as they were prepared and submitted to him for that purpose; but that cannot change their effect in the case. The fact is prominently presented that the action has by that means been disposed of upon the effect of a circumstance entirely unproved. It was the pivotal point in the case, exerting a most material influence upon its final disposition against the plaintiff. For that reason the judgment affected by it cannot be sustained. (*Matthews v. Coe*, 49 N. Y., 57.) It should therefore be reversed and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed, new trial ordered, costs to abide event.

HUN—VOL. X. 28

WILLIAM WHITESIDE AND JAMES WHITESIDE, RESPONDENTS,  
v. SOLOMON HYMAN, APPELLANT.

*Fraudulent representations — compromise induced thereby — remedy of creditor — measure of damages — evidence.*

Where a creditor is induced to compromise a debt upon the receipt of fifty cents on the dollar, by means of the false and fraudulent representations made to him by the debtor, that another of his creditors has agreed to accept such compromise, the creditor may, upon discovering the falsity of such representation, maintain an action against the debtor to recover the damages sustained by reason thereof.

As in such an action the damages sustained by the plaintiff depend upon the ability of the debtor to pay more than a moiety of his debts, it is competent to ask witnesses for the defense whether the defendant held property or assets sufficient to pay over fifty cents on the dollar of his liabilities.

APPEAL from a judgment in favor of the plaintiffs, entered upon the verdict of a jury.

The action was brought to recover the damages sustained by the plaintiffs by compromising a debt owing to them by the defendant, which compromise they were induced to enter into by reason of false and fraudulent representations made to them by the defendant.

Upon the trial a witness called in behalf of the defendant was asked by his counsel, "state whether your father (the defendant) had property or assets sufficient to pay over fifty cents on the dollar of his liabilities?" which question was, upon the plaintiff's objection, disallowed.

*M. L. Townsend*, for the appellant.

*Dennis McMahon*, for the respondents.

DANIELS, J. :

The plaintiffs were creditors of the defendant, who endeavored to compromise his debts, because of his inability to pay them in full. He applied to the plaintiffs to become parties to the composition for the amount of fifty per cent of the sum owing to them. They doubted the good faith of his failure, and were indisposed to assent

to that arrangement. For the purpose of overcoming their doubts, and inducing them to accept his offer, it was alleged that he represented that another firm of his creditors had agreed to accept the compromise proposed, and to discharge him from liability for it, and that, relying upon the truth of the representation made, and what they believed to be the judgment of that firm, they were induced to make the same agreement, and did agree to receive fifty per cent in full of the indebtedness due to them, and afterwards surrendered up the notes held by them for that consideration. This was alleged to have been fraudulent, and the representation made to have been false, and evidence was given upon the trial tending to prove the existence of these facts.

The complaint alleging them was plainly one for fraud, and for that reason the plaintiffs were not at liberty to maintain their action upon any other ground, even if they had proposed to do that. (*Barnes v. Quigley*, 59 N. Y., 265; *Graves v. Waite*, id., 156.) They could not recover for the debt, although its existence appeared by the allegations which were made, because the case disclosed by them was based upon a distinct and different theory. It was for damages sustained by means of the fraudulent representations relied upon, and not for the portion of the debt appearing to remain unpaid, and it was upon that principle that the action was tried and maintained.

As the proof showed the case it could have been sustained in no other form, because it distinctly appeared that in the final consummation of the transaction the compromise was adjusted by Henry Hyman, the defendant's brother, and the account was assigned and the notes formally delivered to him. It was stated to one of the plaintiffs that this person was buying up all the claims, and he then took the check and notes offered for the fifty per cent, and in return assigned the account and delivered over the notes held by the plaintiffs against the defendant. This was also, in substance, sustained by the evidence of the plaintiff, with whom the business was transacted. The account he gave of it was, that "Hyman's son brought the notes, and gave them to my book-keeper, according to the agreement in the paper, and then I surrendered my own notes. In payment for those notes I received a check for a part of the money, and three notes for the balance." The check and notes were pro-

duced. They were drawn by Henry Hyman, and the notes indorsed by the defendant. As this statement showed the business to have been completed, the plaintiff's debt was extinguished by means of it, and it appeared that Henry Hyman, to whom the account and the notes held against the defendant were transferred by the plaintiffs, had afterwards settled with him for fifty cents on the dollar of their amount.

Under these circumstances the plaintiffs were not in a condition to recover on the original indebtedness. The evidence of each party showed that to have been effectually discharged. Consequently the plaintiffs, if they could recover at all, were necessarily limited to their damages for the fraud, if that, in truth, had been perpetrated by the defendant. The evidence given sufficiently tended to sustain the position that it had, to render that a proper subject for the consideration of the jury. And if its existence were satisfactorily established, as it may be presumed from the verdict rendered that it was, then the plaintiffs were entitled to such damages as it had occasioned them. Their claim proceeded upon the theory that they had been induced to surrender their demands against the defendant for less than they would otherwise have received for it, because of his fraudulent representations concerning the terms of his settlement with the other firm, and if that were true, there seems to be no good reason why they should not be allowed to maintain such an action as they instituted for their indemnity. It proceeded upon the allegation that a fraud had been committed, which had resulted in damage to them; and that has often been held to be sufficient to maintain the right of the defrauded party to recover. If one person makes a representation which he knows to be false to another, intending to induce him to act upon it, and he, believing it to be true, does act upon it and thereby sustains a loss, he may maintain an action for the recovery of compensation for such loss against the party by whose misrepresentation it was produced, and it can make no difference, in principle, whether the loss be produced by parting with money or other property, or assigning and surrendering a subsisting indebtedness. The legal elements of the case are the same in one instance as they are in the others. They all alike involve damage to the party by means of the fraudulent deception made use of. (*Atthwood v. Small*, 6 C. & F., 404; *Moens v. Heyworth*, 10 M. & W., 147;

*Gerhard v. Bates*, 2 E. & B., 488; *Farrington v. Bullard*, 40 Barb., 512 and 516; *Willink v. Vanderveer*, 1 id., 599.)

And in *Benton v. Pratt* (2 Wend., 385), a contract not capable of being enforced by action, which was not, but would have been performed but for certain false and fraudulent representations, was held sufficient to render the defendant, who made them, liable. The same principle was also applied to the case of a compromise fraudulently induced in *Baker v. Spencer* (47 N. Y., 562), and it is quite analogous to that which has been applied to the fraudulent negotiation of an undelivered promissory note, rendering the maker liable for its payment to a *bona fide* holder of it. (*Neff v. Clute*, 12 Barb., 466; *Miller v. Manice*, 6 Hill, 114; *Decker v. Mathewos*, 2 Kernan, 313.)

But while these authorities will sustain the right of the plaintiffs to recover for the fraud, upon that being established by them to the satisfaction of the jury, the extent of that right must be necessarily limited to such damages as it has occasioned them. That may be greater or less, according to the ability of the defendant to pay the whole or a part of the residue of their debt at the time when it was surrendered by them, or his probable ability to do so afterwards while they might have otherwise held it against him. It was the value of the unpaid moiety of their debt which they lost by means of the fraud, if that in fact had been perpetrated, and their right to recover that, with interest, was the extent of the indemnity which the law would afford them. To ascertain that, an investigation of the defendant's circumstances at the time of the settlement was entirely proper, and for that purpose the question was competent whether the defendant had property or assets sufficient to pay over fifty cents on the dollar of his liabilities. It manifestly had relation to his condition when the compromise was effected, and as its form was in no way objected to, an answer to it should have been, but it was not allowed.

The objection taken to the inquiry was a general one, which simply presented the point of its competency, and the decision by which that objection was sustained was erroneous. The exception thereupon taken by the defendant was a valid one, and its correction will require another trial of the action.

Several exceptions were taken to the charge, but only one of them

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FIRST DEPARTMENT, MARCH TERM, 1877.

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seems to have been tenable. That was to the refusal to charge that the plaintiffs could not recover upon the original notes and account. The evidence showed that no such recovery could be had in the case, and the jury should have been so instructed by the court. The case was a novel one, and it cannot be a source of surprise that another trial of it has become necessary.

Upon these two points the defendant has just cause of complaint, and to rectify them the judgment should be reversed, and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed, new trial ordered, costs to abide event.

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GEORGE PERAULT, APPELLANT, v. GEORGE RAND AND  
OTHERS, RESPONDENTS.

*Courts-martial — proceedings of, will not be enjoined.*

A court of equity will not restrain, by injunction, a court-martial from trying one, subject to its jurisdiction, where he alleges, as the only ground for such injunction, that he has already been tried upon the same charge, and that he apprehends that the second trial will be unfairly conducted.

APPEAL from an order made at Special Term, denying a motion for the continuance of an injunction.

*Henry H. Morange*, for the appellant.

*James Lyman Price*, for the respondents.

DANIELS, J. :

The appellant had been tried as a member of a military organization by a court-martial, and dismissed by its judgment; upon his own application, he was afterwards restored by virtue of a writ of mandamus, for the reason that his trial and dismissal were not in accordance with the requirements of the law applicable to such proceedings. And another trial was then projected, and he applied for an injunc-

tion to restrain and prevent it, because he had once been tried upon the same charges, and apprehended that the second trial would be unfairly conducted. The grounds upon which this apprehension were entertained, have been practically disproved by the affidavits presented in behalf of the defendants, but if they had not been, the case would not be a proper one for an injunction. The laws have created tribunals, which have been invested with jurisdiction to try military misconduct and offenses, and this court has no authority to nullify their provisions upon this subject, as it certainly would by restraining the proceedings by injunction. If that could be done in the case of a military tribunal, the same authority could be extended over all other tribunals where it might be alleged that there was reason to fear that the trial would not be an impartial one. Courts of equity have no such enlarged authority.

If the party proceeded against has a defense in either a civil or criminal proceeding which can be effectually made before the tribunal having cognizance of the case, the orderly administration of the law requires him to present and maintain it there, and courts of equity cannot ordinarily interfere, by means of an injunction, to prevent that from being done. (*Holderstaffe v. Saunders*, 6 Mod., 16; *Montague v. Dudman*, 2 Vesey, Sr., 396; 1 Water. Eden on Injunc., 67, note 1; *New York Dry Dock Co. v. American Ins. Co.*, 11 Paige, 384; High on Injunc., § 46, and cases cited in note.)

If the plaintiff cannot be lawfully tried upon the charges made against him again, he can present that objection by way of answer to the proceedings which he expects may be instituted; and if he is right in that position, the military tribunal, which must and undoubtedly will conform to what the laws and the Constitution require upon this subject, will allow his objection to prevail. But if it shall fall into an error and improperly reject the defense proposed: in case it shall be established by the evidence produced, then that can be redressed by means of the writ of certiorari. (*Rathbun v. Sawyer*, 15 Wend., 451.) Cases frequently arise where parties are proceeded against a second time on the same complaint or cause of action, and when they can show themselves entitled to protection under the previous proceeding, they are not allowed to be harassed by that subsequently instituted. But redress is always afforded by way of defense in the action or proceeding itself. It is not done by way of injunc-

tion, which would constitute an unjustifiable interference with other tribunals equally as competent, certainly, to administer justice as courts proceeding in equity.

For these reasons, and those assigned by Mr. Justice BRADY on the decision of the motion, the order should be affirmed, with the usual costs and disbursements.

DAVIS, P. J., concurred. BRADY, J., taking no part.

Order affirmed, with the usual costs and disbursements.

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THE PEOPLE EX REL. MATHIAS ZIEGLER *v.* THE JUSTICES OF THE COURT OF SPECIAL SESSIONS OF THE COUNTY OF NEW YORK, RESPONDENTS.

*Obscene literature — chap. 777 of 1873 — age of prisoner — need not be stated in indictment — how determined.*

Under chapter 777 of 1873, prohibiting the publication of obscene literature, and providing that any person convicted thereof shall, if twenty-one years of age or upwards, be punished as therein provided, and prescribing a different punishment if he be under twenty-one years of age, it is not necessary to state the age of the prisoner in the indictment for a violation of the statute.

It is not obligatory upon the court to call witnesses to determine the age of the prisoner, but the court itself may determine his age from its own observation. *Quære*, whether the court may, under the Constitution, examine the prisoner as to his age for this purpose.

CERTIORARI to the Court of Special Sessions of the city of New York, to review the conviction and sentence of the relator for a violation of chapter 777 of 1873, prohibiting the publication and circulation of obscene literature.

*Benj. F. Russell*, for the relator.

*Benj. K. Phelps*, for the respondents.

DANIELS, J. :

The relator was convicted upon his own confession of manufacturing and printing obscene and indecent photographs, and of having in his possession negative plates for printing and making such obscene pictures, and of having large quantities of such pictures in



the room occupied by him, in process of manufacture. This was clearly a criminal offense, according to chapter 777 of the Laws of 1873. That provided that any person who shall manufacture, draw or print, or in any wise make any obscene book, pamphlet, paper, writing, advertisement, circular, print, drawing or other representation, figure or image, on or of paper, or other material, of an indecent or immoral nature or use, shall, on conviction, be imprisoned at hard labor, if twenty-one years of age or upwards, not less than three months or more than two years, and fined not less than \$100 nor more than \$5,000 for each offense; or if under twenty-one years of age, then the imprisonment cannot exceed three months nor the fine exceed \$500. (Laws of 1873, p. 1184, § 1.) The offense is rendered complete by the facts mentioned in the statute without reference to the age of the prisoner. The same act is equally an offense whether perpetrated by a person over or under twenty-one years of age; but the statute has discriminated in the extent of the punishment, by reason of that circumstance. The age is not required to be averred in the complaint upon which the trial is to be had, but merely the facts constituting the crime, and when its commission has been established, the duty for the first time arises to ascertain the age of the accused in order to determine the extent of the punishment. That is a common subject of inquiry in the administration of the criminal law, but the averment of the fact has never been required in the indictment or the complaint on which the trial may be had. The investigation on that subject is never important until after a conviction has been secured, and then it is usually made by means of the prisoner's own oath. That has, in several instances, been prescribed as the proper course to be pursued. But this statute contains no such requirement. For that reason the fact may be ascertained by any means appropriate for that purpose. Evidence may be received from any person capable of giving it for the purpose of proving the fact, or where the appearance of the prisoner sufficiently indicates his probable age, that may be acted upon as evidence of the fact. If witnesses were to be sworn, their evidence on this subject would, in most cases, be necessarily confined to the appearance of the person, and where that indicates that he has advanced beyond the age of twenty-one years, there can be no objection to the court acting directly upon it

without the intervention of witnesses whose judgment would only imperfectly express what the justices could more surely discern for themselves. Cases will arise where the appearance of the person must leave the fact of his age in doubt. There other evidence upon the subject is a plain necessity, but in most instances the indications of age are so unequivocal and decided that not the least risk can be encountered in acting upon them, and when that is the case they may, under the unrestricted provisions of this statute, be accepted as proof of the prisoner's age.

The punishment of the offense has been seriously augmented where it may be committed by a person of twenty-one years of age or upwards, and it may well be doubted whether the convict could be properly required to expose himself to it by any information supplied by his own oath. That would be making him a witness against himself, which the Constitution of the State has prohibited in criminal cases. Under this restraint the court must act on the best information that can be obtained, and not unfrequently that will be supplied by the prisoner's own appearance. That was the course adopted in this case, and by no assertion of the prisoner has it been maintained that the conclusion arrived at was an erroneous one. What is claimed in his behalf is that evidence should have been taken upon the subject by the examination of witnesses. That was not required by the statute nor the nature of the fact to be ascertained. The justices could, as they did, consult their own senses, and act upon the conclusion which they certainly suggested. There can be no more objection to that course in a case like the present one, than in cases where they are required to act upon the fact that the person before them is a child, a boy or a girl, white or black, a male or a female, and as they are not affirmed to have erred in their conclusion, no harm can be done in this case by holding the sentence imposed to have been a proper one. The conviction should be affirmed.

DAVIS, P. J., and BRADY, J., concurred.

Conviction affirmed.

PATRICK CORRIGAN v. JOSEPH B. SHEFFIELD AND  
WILLIAM R. SHEFFIELD.

*Contract of sale — when entire — partial delivery under — destruction of property by fire — who must bear loss.*

On the sixteenth of July, defendants, who were paper manufacturers, agreed to purchase of the plaintiff twenty bales of rags, stating, "We should prefer to have them after the first of August, as that is our time for taking account of stock, and we cannot conveniently discount our paper till after that time." On the eighteenth of July plaintiff shipped ten bales to the defendants, stating, by letter not received till after the nineteenth, that they "had to do it to make room," and that they would ship the other ten as ordered. On the morning of the nineteenth of July the ten bales, with other rags, were delivered and received — though without knowledge that they were part of those purchased from plaintiff — at defendants' warehouse. On the afternoon of that day the warehouse took fire, without any fault of the defendants, and the rags were consumed.

In an action to recover the value thereof, *held*, (1) that the contract was an entire one for the delivery of twenty bales; that the ten bales delivered on account thereof remained at plaintiff's risk; (2) that by the contract, the rags were not to be delivered until August first, and that the defendants were not responsible for what might be delivered before that time.

That there was no acceptance of the rags and no opportunity for such examination as defendants had a right to make, before deciding whether to accept or reject them. (Per DANIELS, J.)

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a verdict directed in favor of the plaintiff.

The action was brought to recover for ten bales of rags delivered by the plaintiff to the defendants, in pursuance of their order in writing, for twenty bales.

The ten bales were shipped by the steamer *Ansonia*, addressed to the defendants at Saugerties, on the 18th day of July, 1872. The rags reached there on the nineteenth, and were taken by the defendants' servants, together with other rags which had arrived at the same time, into the mills of the defendants, where they usually stored their rags until they needed them for manufacture into paper.

On the same day the mills and their contents, including these rags, were destroyed by accidental fire.

The defendants did not know that the plaintiff's rags were among those received, and the letter advising them of the shipment did not arrive until after the fire.

*Albert Cardozo*, for the plaintiff.

*P. Cantine*, for the defendants. The contract for twenty bales was one and indivisible. The situation of the parties was simply this: the respondent not having room to store them, shipped the goods in anticipation of the time, to be received and stored as his goods at his risk until the time for the completion of the contract had arrived. (*Kelly et al. v. Upton*, 5 Duer., 336; *McDonald v. Hewitt*, 15 Johns., 349; *Reimers et al. v. Ridner*, 2 Rob., 11; *Kein v. Tupper*, 52 N. Y., 553; *Hill v. Lynch*, 3 Rob., 52; *Field v. Moore*, Lalor Supp., 418; *Rapelye et al. v. Mackie and others*, 6 Cow., 250; *Murphy v. Adams*, 8 N. Y., 291; *Newcomb v. Cramer*, 9 Barb., 402; *Stephens v. Sauter*, 49 N. Y., 35; *Bronson v. Gleason*, 7 Barb., 476; *Pierson v. Hoag*, 47 id., 243; *Burt v. Dutcher*, 34 N. Y., 493.

BRADY, J.:

The contract for the delivery of rags from the plaintiff is contained in the letter of the defendants, which is as follows:

"SHEFFIELD MILLS,  
"SAUGERTIES, N. Y., July 16, 1872. }

"*Mr. Patrick Corrigan* :

"DEAR SIR.—Yours of the 12th is received. You may send us the 20 bales No. 1. We should *prefer* to have them *after the 1st of August*, as that is our time for taking account stock, and we cannot conveniently discount our paper till after that time.

"Yours truly, etc.,

"J. B. SHEFFIELD & SONS.

"We should prefer to receive no more stock till *after 1st of August*."

There is nothing in the letter and nothing in the proof given showing at what time the rags were to be paid for, but the statement in the letter referring to the first of August, namely, "we cannot conveniently discount our paper till after that time," shows that it was to be paid for at or about the time of its delivery, as they wished

it, namely, after the first of August. The delivery of ten bales before the first of August, by carrier, was as to such quantity clearly for the convenience of the plaintiff, as shown by his letter. "I have this day shipped you ten bales. I had to do it to make room. I will ship the other ten bales, as you ordered, or at any time sooner that you may want them." The letter of the defendant was for twenty bales, and was an entirety. When such a contract exists and the payment is to be made on delivery, no action will lie until the whole is delivered. The delivery of a part of the goods, under such a contract, will give no right of action against the vendee. (*Soloman v. Neidig*, 1 Daly, 200; *Bruce v. Pearson*, 3 Johns., 534; *Kein v. Tupper*, 52 N. Y., 553.) If the contract in this case be regarded as silent as to the time of payment, then by the law the payment is to be made when the goods are delivered. The bales sent to the defendants and taken to their mill, were not so taken with knowledge that they were part of the purchase from the plaintiff. The letter of advice from him to the defendants was not received until after the fire, by which they were burned. It may be said, in addition to this, that the defendants did not engage absolutely to accept the twenty bales before the first of August. They expressed a preference for a delivery after that day, and it was the duty of the plaintiff either to say that they must accept at once or to wait until the time suggested. The defendants gave the reason why they did not wish the goods delivered at once, and the reason related to the payment for them. The plaintiff understood this, and when he sent the ten bales said not only that he had to do it *to make room*, but in addition that he would *send the other ten at the time they were ordered* or sooner. If he had not accepted the terms of the letter as to the delivery after the first of August, it was not necessary to give any reason for the delivery of the ten bales. The effect of that act, accompanied by the letter, was to place the goods at the mercy of the defendants. They could receive or could reject them either because it was a delivery in part or because they were not to be sent until after the first of August. The destruction of the goods on the day they were put in the defendants' mill prevented the exercise of this right, and without fault or laches on the part of the defendants. If, therefore, we apply the rule as to the entirety of the contract or the evident understanding of the parties

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FIRST DEPARTMENT, MARCH TERM, 1877.

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in reference to the time of the delivery as an absolute right, the goods were at the risk of the plaintiff, and not at that of the defendants, under the circumstances stated. If the contract for the sale and delivery of goods be an entirety, and part of the goods are delivered or put in transit for delivery, and are lost or destroyed by fire, no action accrues to the seller against the vendee. The cases cited illustrate this rule and they control our judgment to be pronounced. The verdict should, for these reasons, be set aside and a new trial ordered, with costs to abide the event.

DAVIS, P. J., concurred.

DANIELS, J.:

There was no acceptance of the rags taken upon the defendants' premises prior to the fire which consumed them, and no opportunity for any such examination of them as he had the right to make, before deciding whether to accept or reject them. For that reason I concur in the conclusion.

Verdict set aside, new trial ordered, costs to abide event.

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JAMES C. JACOBS, APPELLANT, v. SYLVESTER J. MILLER,  
RESPONDENT.

*Practice—right of moving party, on motion, to read affidavits not served.*

Upon the hearing of a motion made by the plaintiff for the continuance of a temporary injunction, granted in the action, he will not generally be allowed to read additional affidavits, which are not in answer to new matter introduced by the defendant, but merely corroborative of the facts set forth in the moving papers.

APPEAL from an order denying a motion for the continuance of an injunction.

*Moody B. Smith*, for the appellant.

*Thomas F. Wentworth*, for the respondent.

BRADY, J.:

The appeal in this case rests chiefly on the refusal of the justice presiding at Special Term to allow the plaintiff to read an additional affidavit, in answer to the defendant's case made against the contin-

nance of the injunction. The affidavit thus rejected was not in answer to new matter introduced by the defendant, but corroborative of the facts averred in the complaint, and therefore in support of the equities alleged, which were denied by the defendant. The order to show cause, it must be borne in mind, was not at the instance of the defendant, but was a part of the injunction and order, and granted on the plaintiff's application. The plaintiff is, therefore, the moving party. The defendant responded fully and met the issues presented by denials, sustained in some respects by the affidavit of a third person. Under such circumstances the rule is to deny the application to read an affidavit confirmatory only of the original case, and not responsive to new matter introduced by the defendant or his witnesses. The question was considered in *Powell v. Clark* (5 Abbott, 70) and that case contains an exposition of the law. It is true that the rule is not so rigorous that it may not be relaxed, and it may be said to be somewhat discretionary to receive such an affidavit, but a general adherence to the rule is the practice, except where, from special circumstances, a departure is deemed necessary for the administration of justice. It assimilates to the rule which prevails on trials, and which is, that the plaintiff must exhaust his case before the defendant begins his defense. The plaintiff is rarely allowed to give affirmative evidence of the claim made after the defendant's case is closed. He is confined to rebutting new matter, which is material to the issue. If any other practice prevailed the cause might be continued for an indefinite period, the plaintiff reproving his case, and the defendant reanswering. The rule is a just one; the plaintiff should make his case as strong as the proofs at his command will allow, and the defendant will then know what he has to answer and overcome.

If the question were here whether the discretion was abused, we could not say that it was.

The order made at Special Term should, for these reasons, be affirmed, with ten dollars costs and the disbursements of this appeal.

DAVIS, P. J., concurred. DANIELS, J., concurred in the conclusion, because the moving party had no right to read affidavits in support of his application not served upon his adversary.

Order affirmed, with ten dollars costs and disbursements.

JOHN S. PROUTY, APPELLANT, v. FREDERICK B. SWIFT  
AND ALVIN BURT, RESPONDENTS.

*Judgment — action to set off — effect of prior assignment of judgment.*

The plaintiff recovered a judgment against the defendant Swift in January, 1868. On appeal the same was modified by the Court of Appeals, and the modified judgment was entered in plaintiff's favor on the 27th of March, 1873. In October, 1868, Swift commenced an action against the plaintiff, and on the 10th of November, 1870, a judgment in his favor was entered upon the report of a referee. Before taking up the report Swift assigned to his attorney, the defendant Burt, his claim and the said report, in payment of services rendered and to be rendered in both actions, and thereafter assigned the judgment to him.

In this action, brought by the plaintiff to have the judgment recovered by Swift set off against the one in plaintiff's favor, *held*, that the assignment vested an absolute title to the judgment in Burt, and that when plaintiff's judgment was finally entered against Swift, the latter had no judgment against him which could be set off against it.

Distinctions between rights arising under an attorney's lien upon a judgment and under an assignment thereof, and of remedy by motion and action to offset judgments, considered.

APPEAL from an order refusing to grant an injunction *pendente lite*, to restrain the defendants, or either of them, from proceeding to collect a judgment which the plaintiff claimed the right to extinguish by setting off against it a judgment in his favor.

*Davis & Lyon*, for the appellant.

*J. E. Carey*, for the respondents.

BRADY, J. :

The plaintiff recovered a judgment against the defendant Swift, and the latter recovered a judgment against the plaintiff.

The plaintiff sought, by motion and the application of the law of set off, to extinguish the defendant Swift's judgment, but was unsuccessful, inasmuch as the attorney for the defendant had a lien upon it for its full amount. The plaintiff now seeks to accomplish the same object by this action. The plaintiff's judgment was recovered in the Supreme Court on the 16th January, 1868.



Appeals were taken to the General Term of that court, and to the Court of Appeals. The judgment, modified by the decision of the last court named, was finally entered on the 27th March, 1873. Burt, one of the defendants in this action, was the attorney for Swift in that action in all the various proceedings in it. After the recovery of the judgment in January, 1868, and on or about October, 1868, Swift commenced an action in this court against Prouty, and on the 10th November, 1870, recovered a judgment.

Appeals were taken to the General Term of this court and to the Court of Appeals. The judgment was affirmed by both tribunals.

Burt, one of the defendants herein, as already stated, before the report of the referee was taken up, agreed with Swift to take an assignment of the claim and report, in full payment for his services, and also agreed to pay J. E. Cary, Esq., associate counsel, for his services, and further to argue the appeal from the judgment in favor of the plaintiff rendered in the Superior Court without extra charge, the defendant Swift agreeing that Burt's expenses to and from Albany should be paid by him, if the argument should be made before the Court of Appeals there. This agreement was prior to the entry of the judgment in favor of Swift on the 10th November, 1870, and of course prior to the judgment of the Court of Appeals in the action against Swift. The judgment was also assigned.

It is quite apparent, on this statement of the facts, that the plaintiff herein was not in a condition to ask to set off his judgment against the judgment of Swift, at the time of the assignment to Burt, because an appeal was pending and undetermined. (See *De Figanieres v. Young*, 2 Robt., 670.)

The appeal stayed his proceedings and rendered it uncertain whether his judgment would be retained. The assignment was made not only for services rendered in the actions of the plaintiff against Swift and Swift against the plaintiff, but for services prospectively to be rendered in each case. These services were rendered. The claim of the defendant Burt, it will also be perceived, does not rest upon his lien for the services, but upon an assignment which stands upon a valid consideration, executed in good faith and for an honest purpose. The laborer is worthy of his hire.

The question is whether it shall be secured to him under the circumstances, or yielded to the plaintiff herein. The courts have

declared against the lien of an attorney, when in an action the statutory right of set-off was invoked, making a distinction between motions for that purpose and actions brought.

The rule is familiar and needs only to be stated. The lien of the attorney, however, grows out of the services rendered and after they are rendered, as a general rule, and are not necessarily the offspring of an agreement securing it. It grows out of the relations of the parties to each other. A lien is, however, different from an assignment, especially when the latter is founded not only upon services rendered but to be rendered, and which services to be rendered are the equivalent of so much money paid as those services would be worth. There is no statutory right given to defeat a *bona fide* assignment, legal in all respects. When the statute which the plaintiff invokes was passed, there was no statute authorizing an agreement between attorney and client in relation to the subject-matter of the action to be commenced or in progress, and such a statute having been enacted (see Code, § 303) all prior statutes in conflict with it are repealed by implication. The assignment, therefore, vested in Burt an absolute right, and when the judgment of the plaintiff herein was finally entered against Swift, the latter had no judgment in his favor, for as we have seen it had been assigned long before to the defendant Burt. It had indeed never been the property of Swift, for as we have also seen, the report of the referee, on which it was based, was transferred and became the property of Burt before it was taken up. As the right to set off judgments does not accrue until judgment has been perfected, the *bona fide* assignment, previous to judgment, will cut off the right to have such judgment set off against the party in whose favor it was rendered. (*Perry v. Chester*, 53 N. Y., 243; *Mackey v. Mackey*, 43 Barb., 58; *Roberts v. Carter*, 38 N. Y., 107.)

For these reasons the order appealed from should be affirmed, with ten dollars costs and the disbursements of this appeal.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

ANNE CONNORS, ADMINISTRATRIX, ETC., RESPONDENT, v. AMOS  
N. TITUS, IMPLEADED, ETC., APPELLANT.

*Discontinuance of action—on ground that it has been settled—what must be shown upon application for.*

Where a motion is made to discontinue an action, on the ground that one of the defendants has settled and discharged the plaintiff's claim, the party so applying must furnish such evidence in proof thereof as would be sufficient to sustain a plea of *puis darrien continuance*, or a supplementary answer setting up such settlement.

APPEAL from an order denying a motion for a discontinuance of this action on the ground that one of the defendants settled and discharged the plaintiff's claim. The attorney for the defendant Titus, who made the application, set forth in his affidavit, among other things, "that on or about the eleventh day of January, inst., deponent was informed by the clerk and agent of the defendant, James M. Shaw, and verily believes that the claim alleged in the complaint in this action was compromised and settled by said defendant Shaw; that deponent has been informed and verily believes that the sum of \$700 was paid by said Shaw to said plaintiff, or her attorney, in satisfaction of the damages for which this action was brought, and that said sum was paid on or about the 1st day of October, 1876, together with the costs and disbursements of this action."

*G. W. Brewster*, for the appellant.

*Daniel R. Lyddey*, for the respondent.

BRADY, J.:

This appeal is not embarrassed by any question arising from the payment by one of several defendants of his part of the claim made against all.

The allegation is that one of them paid the plaintiff a sum in satisfaction of the damages for which this action was brought, but the statement is made wholly on information and belief, and is mere hearsay, and therefore insufficient.

FIRST DEPARTMENT, MARCH TERM, 1877.

On an application like this, the party must furnish evidence which would be sufficient to sustain a plea of *puis darrien continuance*, or supplementary answer setting up the settlement.

The proof submitted would not be admitted for that purpose, and the motion was, therefore, properly denied.

Ordered accordingly, with ten dollars costs and disbursements of this appeal.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

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MARIA PAULINE VON WALLHOFFEN, APPELLANT, v.  
RICHARD S. NEWCOMBE AND DAVID LEVENTRITT,  
RESPONDENTS.

*Attorney — liability of, for malpractice.*

On the 10th of March, 1873, the plaintiff employed defendants to procure a divorce for her from her husband, and agreed to and did pay \$1,500, at once, to defray expenses to be incurred by them in proceeding to Berlin to ascertain facts upon which to frame a complaint, and agreed to pay the further sum of \$2,000 in case the divorce was obtained in three months from the date of the agreement. An order was procured in the action for the service of the summons by publication, on the ground of the non-residence of the plaintiff's husband. On the 2d of June, 1873, a final decree for divorce was obtained, and the plaintiff, on the 4th of June, paid to the defendants the \$2,000, and some few weeks thereafter she remarried.

In August following, the husband applied to have the divorce vacated, and subsequently an order was made allowing him to come in and defend the action on account of gross irregularities committed by the defendants in obtaining the judgment. In this action, brought by the plaintiff to recover the moneys paid under the agreement and damages for malpractice, *held*, (1) that as the plaintiff had paid the money in ignorance of the fact that the judgment had been irregularly obtained, she was entitled to recover the same; (2) that as the judgment had been opened on account of the ignorance and negligence of the defendants, she was entitled to recover the damages sustained by her in consequence thereof.

APPEAL from a judgment in favor of the defendants, entered on the dismissal of the complaint at Circuit.

*Townsend & Reed*, for the appellant.

*Albert Cardozo*, for the respondents.

DAVIS, P. J.:

This action was brought to recover damages for the alleged malpractice of the respondents, as attorneys, and also to recover moneys paid to them as such attorneys, under a special agreement, which it claimed they had not performed. On the 10th of March, 1873, the appellant, then known as Maria Pauline Lucca, entered into a written agreement with the respondents, whereby she employed them as her attorneys and counselors to procure for her a divorce from her then husband, Adolf von Rhade. She paid to them, on making the agreement, the sum \$1,500, which they agreed to accept in full payment for the expenses and services of one of them proceeding to Berlin, for the purpose of examining witnesses to prove facts on which to base a complaint for divorce. The contract then contained the following agreement: "It is hereby further agreed, that in the event of said parties of the second part succeeding in obtaining, and procuring to be obtained a decree of divorce within three months from the day of the date hereof, that said party of the first part will thereupon immediately pay to them the sum of \$2,000, which said parties of the second part hereby agree to accept in full payment for all services and expenses appertaining to such proceedings for a divorce."

The appellant alleged in her complaint that on or about the 4th day of June, 1873, the defendants represented to her that they had fulfilled their part of this agreement, and demanded of the plaintiff, and the plaintiff thereupon paid to them, the sum of \$2,000, as provided by said agreement. She alleged also that the defendants, by unskillful management and inexcusable negligence, not only failed to procure an effectual judgment, but that she had been subjected to very large damages and expenses by reason of such negligence. On the trial it appeared that the respondents commenced an action for a divorce on or about the 10th of March, 1873, which was the date of the agreement, and of course before they could have gone to Berlin for facts "upon which to base a complaint," as provided in the agreement; that they procured an order for publication of the

summons on the ground of the non-residence of the defendant in the action, and afterwards published the same; and that upon an alleged default to answer, they obtained an order of reference and took proofs, which the referee must have supposed tended to establish the material facts alleged in the complaint; that afterwards, upon the referee's report, and on or about the 2d of June, 1873, they obtained a final judgment, adjudging that the marriage between the appellant and her then husband be dissolved, and that the appellant be at liberty to remarry, and decreeing to her also the custody of her child. Some few weeks afterwards the appellant remarried; and in August following, her former husband, the defendant in the divorce suit, appeared by his attorneys and made a motion to the court to vacate and set aside the judgment in such action of divorce.

Such proceedings were had, that the judgment was opened by the Special Term, and the defendant therein allowed to come in and defend upon terms; and afterwards, on appeal to the General Term, that order was modified so as to allow to the defendant unconditional liberty and right to answer the complaint in the action, giving him forty days from the entry of the order on appeal to serve his answer, and allowing the appellant to file and serve a supplemental complaint, within twenty days after notice of the order, and the defendant to answer the same within forty days from the service thereof. It was proved that on obtaining the judgment of divorce, the defendants presented a copy of the same to the plaintiff, and received the \$2,000 provided for in the agreement above set forth.

It is obvious, from the papers produced on the trial, that the court below opened the judgment to allow the defendant therein to come in and answer and defend the action, notwithstanding the subsequent marriage of the plaintiff, because of several gross irregularities committed by the defendants in obtaining the judgment. The affidavit upon which the order of publication was obtained was defective in not stating what, if any, diligence had been used to find the defendant within this State. The order directed the publication of the summons "thereto annexed;" the summons then annexed required the appearance of von Rhade within six days. The order of reference was obtained from the court before the expiration of the time for the defendant in the action to appear and answer. On the hearing before the referee, no evidence of the

adulteries alleged in the complaint was produced, but evidence was produced tending to prove adulteries committed after the commencement of the action. The judgment roll was entered without containing the summons in the action. These several things were irregularities which could only be attributable to gross negligence on the part of the attorneys; and they showed a state of facts which, if known to the appellant before the payment of the \$2,000, under the agreement, would have constituted a perfect defense to an action to recover that sum. In *Hopping v. Quin* (12 Wend., 517), the court held that an attorney cannot recover against his client for the costs of a suit in which the judgment is set aside for irregularity; nor the costs of opposing the motion to set aside the proceedings; nor can he recover for money paid for his client, if it be paid to satisfy the costs of a judgment of discontinuance suffered by his negligence or ignorance. The evidence in this case tended strongly to show that all these irregularities were unknown to the appellant at the time the certified copy of the judgment was presented to her by the respondents; and that she made payment of the \$2,000, under the agreement, believing that it had been fully performed by the defendants, and that her divorce was effectual and complete. She was afterwards married, as appeared in the case, to her present husband; and at such marriage the respondents, as appeared by the certificates put in evidence, were present as witnesses.

It is manifest that the fact of the unfortunate position in which the appellant was placed by her second marriage, alone prevented the court, upon the motion, from absolutely vacating the decree. It did, however, in the disposition of the motion, put the judgment in such a condition that it will be of no avail to the plaintiff unless, upon the subsequent contested trial, she establishes against her former husband the acts of adultery alleged in the original or supplemental complaint. This state of facts tends strongly, if not conclusively, to establish that at the time the \$2,000 were paid on the agreement, the respondents were not entitled to receive any portion of it; and that the appellant paid it in good faith, believing that the agreement had been fully performed, and relying upon acts on the part of the respondents which amounted to representations, that the decree or judgment required by the agreement had been regularly and properly obtained. Upon such a state of facts, there

seems to be no doubt that the appellant was entitled to go to the jury upon the question whether the \$2,000 had not been paid to the respondents without consideration, and upon substantial misrepresentations.

In respect of so much of the action as relates to damages for the alleged malpractice, the evidence, it seems to us, was sufficient to have been submitted to the jury upon that question. "Every person who enters a learned profession, undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that, at all events, you shall win your case; nor does he undertake to use the highest possible degree of skill; but he undertakes to bring a fair, reasonable and competent degree of skill." (*Lanphier v. Phipos*, 8 Carr & Payne, 475; *Hancke v. Hooper*, 7 id., 84; *Shilcock v. Passman*, id., 289; *Pitt v. Yalden*, 4 Burr, 2060.) The law requires that every attorney and counselor shall possess and use adequate skill and learning, and that he shall employ them in every case, according to the importance and intricacy of the case; and if a cause miscarries in consequence of culpable neglect or gross ignorance of an attorney, he can recover no compensation for any services which he has rendered, but which were useless to his client by reason of his neglect or ignorance. (*Gleason v. Clark*, 9 Cow., 57; *Hopping v. Quin*, *supra*.)

An attorney must be presumed to be familiar with the law and rules regulating the practice in actions which he undertakes to bring. This part of the business of the practice of law pertains especially to the duties of an attorney. It is, substantially, merely clerical or mechanical in its character; and ignorance of the law and rules of practice, on the part of attorneys, or negligence in conforming to them in obtaining judgments, are altogether inexcusable. Such ignorance and negligence subject an attorney to actions for injuries which their clients may sustain.

Another rule prevails for acts done in their relation of counselors, when called upon to give advice upon questions of law. In such cases the liability only arises for gross ignorance or negligence; and in performing the duties of counsel the attorney is not liable for errors in judgment upon points of new occurrence, or those of nice and doubtful construction. (*Godefroy v. Dalton*, 6 Bing., 468.)



It was held, in *Galpin v. Page* (18 Wall. [U. S.], 350), that the law imputes knowledge to an attorney, of defects in legal proceedings for the sale of property taken under his direction. In *Kemp v. Burt* (4 Barn. & Ad., 424) it was held to be actionable negligence to lay the venue in a wrong county. In *Williams v. Gibbs* (5 Ad. & El., 208) it was held that to bring an action in a court which had no jurisdiction subjected the attorney to liability.

In *Smedes v. Elmendorf* (3 Johns., 185) it was held that delay in bringing an action until too late, so that the claim was lost, would render the attorney liable. In *Varnum v. Martin* (15 Pick. [Mass.], 440) the attorney was held liable for omitting to insert in a writ the full amount of his client's claim, whereby the latter sustained a loss. The cases on this subject are quite fully collected in Wait's Actions and Defenses (vol. 1, 459) and also in Wait's Practice (vol. 1, 242).

It is apparent that the judgment in the divorce suit was not opened as a mere *matter of favor* to the defendant therein. The court would not have been likely to do that where it appeared that the plaintiff had remarried in good faith, relying upon the judgment; but it was opened because of gross irregularities. The justice, at Special Term, said: "The irregularities in this case are so palpable that they should not be sanctioned, so far as to shut out any actual defense, if a just and meritorious defense exists and can be proved."

And, in speaking of one of these irregularities, Mr. Justice DANIELS, at General Term, said: "That was an inexcusable irregularity, indicating a gross inattention to the condition of the proceedings on the part of the plaintiff's attorney." And again, he said, "the proceedings in the action abound in such defects and irregularities, that ordinarily they would require the court to set aside the judgment. It was in tenderness to the peculiar position of the plaintiff in this action that the judgment was not altogether set aside."

In these days, when lawyers are made with such easy and rapid facility, their unfortunate clients ought not to be deprived of such protection as the right of action for *malpractice* can secure.

In respect to the introduction of proof before the referee, of adulteries committed long after the action was commenced, it is a mild form of description to say that the act of the attorneys was a gross irregularity. Upon the question of actionable negligence or

ignorance of the attorneys, there was abundance of evidence to require the submission of the case to the jury. There was proof of very heavy expenses incurred by the appellant by reason of such negligence. It is not necessary to consider how much of this can be recovered as a just measure of damages in the case. It is enough that the appellant has shown herself entitled to some measure of damages, in case the jury find that the actionable conduct of the defendants was such as subjected her to any damages.

The complaint ought not to have been dismissed. The judgment entered upon the dismissal must, therefore, be reversed and a new trial ordered, with costs to abide event.

DANIELS, J., concurred ; BRADY, J., concurred in the result.

Judgment reversed, new trial ordered, costs to abide event.

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NELSON H. SALISBURY, RESPONDENT, v. JOHN F. STINSON,  
APPELLANT.

*Complaint for goods sold — Non-payment of claim — need not be alleged — demurrer.*

A complaint alleging that the plaintiff "sold and delivered to the defendant certain goods of the value, and for which the defendant agreed to pay \$164.68," is sufficient, and it is not necessary to allege that the demand has not been paid, or that it remains due and unpaid at the time of commencing the action.

APPEAL from an order made at Special Term, overruling as frivolous a demurrer interposed to the complaint.

*Albert Roberts*, for the appellant.

*Jeroloman & Arrowsmith* for the respondent.

DAVIS, P. J. :

The count of the complaint demurred to in this case alleges "that heretofore, and on and between May 12, and May 20, 1873, one Edward MacDavis sold and delivered to the above-named defendant certain goods of the value, and for which the defendant agreed to

pay the sum of \$164.68." It then alleges an assignment of the account to the plaintiff, and judgment is demanded for the above sum, with interest.

The defendant demurred, on the ground "that the complaint, as to the first alleged cause of action, does not state facts sufficient to constitute a cause of action."

The point urged under this demurrer is, that the count does not allege that the demand has not been paid, or that it remains due and unpaid. The count, however, contains every fact necessary to be proved on the trial, to wit: a sale and delivery of the goods to the defendant, an agreement to pay a stipulated price therefor, and an assignment to plaintiff. Proof of these facts would entitle plaintiff to a verdict without giving affirmative evidence that the price agreed upon had not been paid. Under the Code this is sufficient. "A plain, concise statement of facts, constituting a cause of action without unnecessary repetition," is all that is required. (Code, § 142.) This means only the facts necessary to be proved by plaintiff, and upon proof of which he is entitled to judgment. Under the former practice, the complaint would probably have been bad on special demurrer for not alleging a breach, but under the present system, when the breach is presumed on proof of the facts alleged, it is only necessary to aver the facts, although the averment of non-payment, or that the sum remains due and unpaid, in such a case as this, is the usual and more complete form of pleading. Upon the facts stated, the debt is due presently, and no demand is necessary; and there is no necessity to allege that it has become payable by lapse of time. Payment is an affirmative defense, and should be alleged and proved by the defendant.

The order should therefore be affirmed, with costs.

BRADY and DANIELS, JJ., concurred.

Order affirmed, with costs and disbursements.

LYMAN F. HODGES AND OTHERS, RESPONDENTS, v. THOMAS  
E. PORTER AND OTHERS, APPELLANTS.

*Action by non-resident—security for costs—Code, § 238—R. S., part 3, chap. 10,  
title 2, § 1.*

In this action, brought by the plaintiffs, who were non-residents, to enforce an attachment, issued in another action in which they had recovered judgment, they gave to the sheriff the bond of indemnity required by section 238 of the Code. *Held*, that they were not thereby relieved from giving security for costs, as required by part 3, chapter 10, title 2, section 1, of the Revised Statutes.

APPEAL from an order denying a motion, that plaintiff be required to file security for costs.

This action was brought by the plaintiffs, non-residents of this State, to enforce a warrant of attachment, issued by this court, in an action wherein these plaintiffs were plaintiffs and one Vallean was defendant, under which certain property in the hands of the present defendants, alleged to belong to Vallean, had been levied upon. The plaintiffs, having recovered a judgment against Vallean, brought this action under section 238 of the Code, to obtain the said property, having given to the sheriff the undertaking required by that section.

*Edward Fitch*, for the appellants.

*B. F. Blair*, for the respondents.

DAVIS, P. J.:

The plaintiffs are conceded to be non-residents of this State. They bring this action as attaching creditors of one Vallean, also a non-resident, and for the purpose of entitling them to sue, they gave to the sheriff the bond required by section 238 of the Code. That bond was thought, by the court below, to excuse them from giving the security for costs to the defendants under the provisions of the Revised Statutes. (R. S., § 1, title 2, chap. 10, part 3.)

This we think was an error. The bond to the sheriff under sec-

tion 238 simply indemnifies the sheriff from any damages, costs and expenses he may suffer by reason of this action; but as the defendants, if successful, can recover no judgment against the sheriff or collect their costs of him, that bond is of no avail to them. Neither the plaintiffs nor their sureties would be liable on it to the defendants for their costs. The defendants allege in their answer that the moneys in their hands do not belong to the person against whose property the plaintiffs issued their attachment. They do not allege title in themselves, but show a state of facts which tends to show that they cannot pay the same on the attachment or judgment without being liable to another party, also a non-resident, who has notified them of his title and claim. The court below thought that it was their duty to interplead that party, and not set up a defense themselves. That party, however, is a non-resident, and perhaps cannot be brought in by defendants. Still, if the interpleader were practicable, it is not a course necessary to be taken in order to entitle defendants to security for costs. If the other claimants were brought in, the plaintiffs would not thereby be excused from giving the security to them. The defendants, however, have chosen to defend themselves on the title of the other claimant, who is so connected with them as to justify that defense, and they are, therefore, entitled to security for costs, precisely as though they had interposed any other legal defense. The order must be reversed, and the motion below granted, with ten dollars costs of this appeal, besides disbursements. The order should direct plaintiff to file security by a bond, in the penalty of three hundred dollars, within twenty days after service of the order to be entered hereon.

DANIELS, J., concurred. BRADY, J., not sitting.

Order reversed, motion below granted, with ten dollars costs and disbursements.

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THE PEOPLE EX REL. ST. JOHN'S COLLEGE, APPELLANTS,  
v. THE COMMISSIONERS OF TAXES AND ASSESS-  
MENTS OF THE CITY AND COUNTY OF NEW YORK,  
RESPONDENTS.

*Exemption from taxation — § 5, 1 R. S. (5th ed.), 906 — effect of highway running through lot.*

The exemption from taxation, created by section 5 of 1 Revised Statutes (5th ed.), 906, in favor of the "lots" upon which the buildings therein specified are situated, is not affected by the fact that such lot is divided by a highway into two portions, one of which is occupied by college buildings, and the other as a garden for the use of the pupils and teachers and for their recreation and walks, the whole lot being used for precisely the same purposes as before the construction of the highway.

*People ex rel. The Academy of Sacred Heart v. The Commissioners* (6 Hun, 109) followed.

CERTIORARI to review assessment of certain real estate of the relators.

The relators own real estate in the Twenty-fourth ward of the city of New York, amounting to about 103 acres. This real estate is divided by the boulevard, a public thoroughfare 100 feet wide, into two separate lots or parcels. Upon one of the lots all the buildings of the relators are situated, and this lot the respondents marked as exempt from taxation.

Upon the other lot lying beyond the boulevard there are no buildings, and this lot the respondents have assessed for taxation.

The relators claim that the respondents erred in assessing this lot, and ask that it may be exempted from taxation, on the ground that it was used in connection with and devoted to the same purposes as the lot upon which the buildings were.

*Charles N. Morse*, for the relator.

*Hugh L. Cole*, for the respondents.

DAVIS, P. J.:

The question involved in this case was elaborately discussed by this court in *The People ex rel. The Academy of the Sacred Heart v. The Commissioners* (13 S. C. [6 Hun], 109). The decision in

that case was affirmed by the Court of Appeals, as is understood, upon the opinion of DANIELS, J., pronounced in this court. There is no substantial difference in the cases, though one is sought to be found in the fact that a public highway, known as the southern boulevard, passes through the premises of the relator, separating the twenty-five and seventy-five one-hundredths acres now assessed, from that portion on which the college buildings stand. But it appears, by the affidavit of the president of the college, which is annexed to the return in this case, "that the lots, whereon the buildings erected for the use of the said college are situated, comprise about 103 acres, and are contained in one parcel; that a portion of said lots is occupied by the buildings of said college, and the remaining portions of said lots are used, respectively, as a vegetable garden and for farming purposes for the use of the pupils, teachers and officers of the college, as a cemetery, and for the recreation and walks of the pupils and other persons connected with the college, who number about 300 persons; that the whole land, so used as aforesaid, is necessary for the use and sufficiency and applicability of the buildings thereon for the purposes of the college; and that they are used, owned and applied exclusively in the manner and for the purposes aforesaid; and that no part of the said lots are leased or otherwise made a source of profit to the corporation, but all are in the occupancy of the said corporation for the purposes of said college." This statement is in nowise controverted by the respondents, except so far as that is supposed to be done by showing, by the return and by the map annexed thereto, that the public highway above mentioned crosses the property of the college in such a manner as to leave on the west side the portion on which the buildings are situated, and on the east side, the part on which are the cemetery and other grounds, with out-buildings; but the whole is accurately designated on the map as "St. John's college grounds." We think that the accident that a public highway has been constructed over the grounds does not destroy or affect their identity as "the lot," within the meaning of the exemption statute, on which the buildings are situated. (1 R. S., 905 [5th ed.].) The connection and unity of the whole parcel for the uses of the college remain, notwithstanding the public easement. The intersection of public highways are not in themselves such a severance as of legal neces-

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FIRST DEPARTMENT, MARCH TERM, 1877.

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sity divides the grounds of the college into exempt and non-exempt parcels. That division must depend upon other facts which control its effect. In this case, facts are shown, without contradiction, which clearly establish that "the lot" of the college, for all purposes of use, and consequently of exemption from taxation, remains precisely as before the construction of the boulevard. A very apt case is cited from the Supreme Court of New Jersey. In that State, the statute defines the exemption as "the lands whereupon such buildings are erected," which is substantially the language of our statute. In *The State v. Ross* (4 Zabriskie, 501) the court held that the construction was not changed by the fact that the buildings in question were upon lots inclosed by substantial fences, and some of them separated by those fences, and others by a lane and public street, from the other college grounds."

The relator is entitled to judgment exempting the whole of the college grounds from taxation, and directing the same to be struck from the assessment roll.

Ordered accordingly.

BRADY and DANIELS, JJ., concurred.

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CHARLES A. HARRINGTON, RESPONDENT, v. THE MAYOR,  
ETC., OF THE CITY OF NEW YORK, APPELLANT.

*Contract to furnish materials—words "more or less" in—meaning of.*

On the 28th of October, 1873, the plaintiff entered into an agreement with the defendant, whereby he agreed to deliver "2,000 cubic yards of sand \* \* \* more or less," the contract to be duly completed and performed on his part by October 1, 1874. In pursuance of requisitions duly made by defendant's engineer, all bearing date prior to October 1, 1874, materials were delivered thereunder largely in excess of the quantities therein specified. A portion of the materials were delivered after October 1, 1874, but no objection to the reception thereof was made by the defendant either on the ground of delay or as being in excess of the amounts prescribed in the contract.

In an action brought by the plaintiff to recover the contract-price of the materials delivered in pursuance of the contract, the defendant insisted that no recovery could be had for the materials furnished in excess of the quantities specified



in the contract. *Held*, that the quantities specified were estimates only, and could be increased by requisitions duly made by the defendant's officers, and that such requisition having been made, and materials delivered, in pursuance thereof, to and accepted by the defendant, it was liable for the price thereof.

APPEAL from a judgment in favor of the plaintiff entered upon a verdict directed by the court.

This action was commenced to recover the sum of \$5,380 for material furnished by plaintiff to defendant.

The complaint contains two causes of action: The first for material furnished the department of docks; the second, for material furnished the department of public works. No question arises on the second cause of action.

It was not disputed that all the materials were furnished to, received and used by, the defendant, and were worth the prices charged. By the provisions of the contract the plaintiff agreed to furnish riprap, broken stone and sand, "quantities estimated as follows:

"2,000 cubic yards sand,	} more or less."
"3,000 cubic yards broken stone,	
"5,000 cubic yards riprap,	

The contract was dated October 28, 1873, and contained an agreement on the part of the plaintiff that all the material called for should be furnished by him, and the contract completed on his part by the 1st day of October, 1874.

Prior to October 1, 1874, plaintiff had furnished and defendant had received more than the quantities above named. On September 29, 1874, requisitions were issued for materials, which were delivered after October first. Such materials were received and used by the department of docks without any objections on account of the delay. Defendant paid for all materials so furnished up to and including those furnished December 26, 1874, but refused to pay for those furnished after that date, on the ground that the quantities were in excess of, and consequently outside of, the contract, and also on the ground that, although ordered before, they were not delivered until after the period fixed for their delivery, viz., October 1, 1874.

*A. J. Requier*, for the appellant. It is well settled that the words "more or less," when contained in a contract of sale or deed,

simply import that the quantity is not restricted to the exact number or amount specified, but that the vendor or grantor is to be allowed a certain moderate and reasonable latitude in the performance, or for small errors of survey and variations of instruments. (Benjamin on Sales, 604, § 691; *Brady v. Henion*, 8 Bosw., 536, 537; *Cross v. Eglin*, 2 Barn. & Adol., 106; *Thomas v. Perry*, 1 Peters' C. C. R., 58; *Quessel v. Woodlief*, 2 Hen. & Munf. [Va.], 173, n; *Gentry v. Hamilton*, 3 Ired. [N. C.], Eq., 376; *Hoffman v. Johnson*, 1 Bland [Md.], 109; *Cutts v. King*, 5 Me. [5 Greenl.], 482; *Blaney v. Rice*, 20 Pick., 63; *Phipps v. Tarpley*, 24 Miss., 599; *Sullivan v. Ferguson*, 40 Mo., 89; *Shipp v. Swan*, 2 Bibb. [Ky.], 82.) And that whether the quantity proved, under a written contract, is excessive or not, is a question of law for the court alone. (*Cabot v. Winslow*, 1 Allen, 546.) Such excessive deliveries not having been made under said contract, and there being no allegation or pretense of the same having been made under any other like one in form, and such form being indispensably essential to a recovery under section 91 of chapter 335 of the charter act of 1873 (Laws of 1873, p. 508), it necessarily resulted that no recovery could be had against the defendants on the first cause of action alleged. (*McDonald v. The Mayor*, 4 N. Y. S. C. [T. & C.], 178; *Donavan v. The Same*, 33 N. Y., 292; *Smith v. Same*, 10 id., 538.)

*Griggs & Signor*, for the respondent. The words "more or less" and "quantities estimated" show that only an estimate of the quantities was intended, and that the parties were not to be bound by the quantities named. (*Guillin v. Daniell*, 2 C., M. & R., 61; *McConnell v. Murphy*, 21 W. R., 609; *Cockerell v. Aucompte*, 2 C. B. [N. S.], 440; *Havemeyers v. Cunningham*, 35 Barb., 515.) For a review of cases where this expression has been used in transfers of real estate, see *Bellmap v. Seeley* (14 N. Y., 144, 151). The defendant could, through its contracting officers, waive the provisions requiring plaintiff to deliver the material before October 1, 1874, and receive them afterward. (*People v. Village of Yonkers*, 39 Barb., 266.)

BRADY, J.:

The specifications forming a part of the contract between the parties hereto contained the following statement:

"Quantities *estimated* are as follows : 2,000 cubic yards of sand ; 3,000 cubic yards of broken stone, for concrete ; 5,000 cubic yards of riprap stone, for foundation, *more or less*." By the contract, the plaintiff was to furnish "all the sand and broken stone, of the quality and quantity, in the manner and under the conditions specified. And it was further agreed by the plaintiff and the defendants, that the delivery of the material should be commenced at such time and *carried on in such quantities*, and delivered at such points as should be directed by the engineer."

It was also provided that if the plaintiff failed to deliver, the defendants should have the power to purchase such quantity of material as might be necessary to fulfill the contract, or such part as the engineer might deem necessary.

It will be perceived that the quantities named in the specifications are estimates only, and might be enlarged by the proper requisitions ; they were, in fact, increased beyond the estimate, and the bills for them paid without objection. They were still increased, and the plaintiff, yielding to the case under the contract, delivered upon the requisitions made, which it is conceded were all regular. The property thus obtained from the plaintiff, was used for the objects contemplated by the contract, when it was entered into, and there is, therefore, no charge of fraud or collusion.

The case finds no elucidation from adjudication on the subject of what is embraced within the words "more or less," because the defendants enlarged their signification, both by the acts of their officers, and the satisfaction of such acts which resulted from the payment for the quantities in excess, delivered, and the plaintiff assented. There was no dispute.

The quantity, as suggested, was an estimate only ; and, clearly, the plaintiff would be bound, under the contract, to deliver all that was necessary to fulfill his contract, or such part thereof as the engineer might deem necessary.

The contract provided for disputes as follows : To prevent all disputes and litigation, it is further agreed by and between the parties to this contract, that the said engineer shall in all cases determine the amount or the quantity of material which is to be paid for under this contract ; and he shall determine all questions as to the quality and dimensions of the same ; and he shall in all cases decide

every question which may arise relative to the execution of this contract on the part of said contractor; and his estimates and decision shall be final and conclusive.

And for the various quantities delivered the plaintiff had the certificate of the engineer, and that of the commissioners of the department of docks and of the department of public works, in reference to these additional quantities lawfully employed in the service of the city. The defendants, acting on the proposition that the plaintiff was called upon to deliver under the contract, made through the departments the requisitions upon him, and they were complied with. The plaintiff did not dispute this interpretation; and now the property having been delivered, received and appropriated under a binding contract, still in *esse* it was supposed, the defendants seek, by a narrow construction of the words "more or less," to avoid payment for the materials thus obtained and used.

We know of no principle which prevents the delivery of materials under the words "more or less" which the parties regard within its operation. If the contract were between individuals there could be no dispute about it.

The same rule must apply to the defendants in the absence of fraud, and in the presence of the fact that the property delivered was in fact used by them.

The doctrine of *ultra vires* does not apply, because there was a contract under which the property was demanded and delivered. The terms of the contract made the agents of the defendants the arbiters as to the quantities to be delivered, and protected them in all respects against a failure on the part of the plaintiff to deliver, and further, against all disputes, by arranging the manner, if any arose, in which they should be settled.

It cannot be said that there was no contract in relation to the property delivered. It is said, however, that the contract had expired by its own terms, but this does not appear. It was general in its character. It called for certain materials for general use and in quasi estimated quantities, but contemplated the delivery of more than the estimate, and more in fact was required by the defendants. The delivery under the contract must be regarded therefore as advantageous to the city as to prices, and as the property was necessary for

the requirements of the city, for such we must assume it to have been, it cannot be said that the contract expired by its own limitation.

The defendants extended it, and the plaintiff acquiesced. In the absence of fraud, we think this construction of the dealings under the contract is just and fair and fully warranted by the application of the rights and obligations of the parties to the contract, all its covenants and conditions being duly considered. This case is not controlled by the decision in *McDonald v. The Mayor* (4 N. Y. S. C. [T. & C.], 178), or *Bigler v. The Mayor* (6 Hun, 239), or by the decision of this court in *Bigler v. The Mayor*, when last before this court. In the former case there was no existing contract; indeed no contract had been executed or made in reference to the materials delivered, and in the latter case the claim was for a balance due for lumber and timber delivered to the department of docks, and in which the defense set up was not only that the materials delivered were not in conformity to the contract, but were of an inferior quality; and further, that the plaintiff fraudulently caused them to be certified to be such as were called for by the contract. The honesty of the claim herein is not assailed. It is not shown or asserted that the materials were not such as were contemplated, nor is it denied that they were used by the city.

The demand seems to be justly due on the facts disclosed, and should be paid.

Judgment affirmed, with costs.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed, with costs.

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IN THE MATTER OF ANDREW L. ROBERTS, AN INSOLVENT AND  
IMPRISONED DEBTOR, APPLYING TO BE DISCHARGED FROM HIS  
IMPRISONMENT.

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*Application for discharge of insolvent — Res adjudicata.*

Where, upon an application made by an insolvent debtor for a discharge, it appears that a similar application has already been made to one of the judges of the Court of Common Pleas of the city of New York, and having been fully heard, has been decided against him upon the merits, *held*, that the matter should be regarded as *res adjudicata*, and the application denied.

APPEAL from an order denying the application of an insolvent debtor for a discharge under part 2, chapter 5, title 1, article 5 of the Revised Statutes.

*Vedder Van Dyck*, for the appellant.

*R. C. Elliott*, for the respondent. Act of 1854 (Laws of 1854, p. 592, chap. 270) provides for appeal to the General Term from any judgment or order in any special proceedings. (*Matter of Livingston*, 34 N. Y., 557.) *Certiorari* will issue to remove to the Supreme Court for examination and review. (2 R. S., 49, 50, § 47; Laws of 1874, chap. 280, § 17; *Garaner v. Commissioners, etc.*, 10 How. Pr., 181; *People ex rel. Louis v. J. F. Daly*, 4 Hun, 641; *Morewood v. Hollister*, 6 N. Y., 309.) That the principle of *res adjudicata* applies in these cases. (*Demarest v. Day*, 32 N. Y., 281; *White v. Coatsworth*, 6 id., 137; *Yonkers and N. Y. F. I. Co. v. Bishop*, 1 Daly, 449; *Powers v. Witty*, 42 How. Pr., 352; *People ex rel. Lodowick v. Akin*, 4 Hill, 606.) The same principle applies in cases of *habeas corpus*. (*Mercein v. People*, 25 Wend., 64; *People v. Burnett*, 13 Abb. Pr., 8; *People v. Kelley*, 1 id. [N. S.], 432; *Matter of Rosenberg*, 10 id., 450; *Matter of Thomas*, id., 114.) If the debtor can make a second application after being defeated in the first, there can be no limit to the applications, and the creditor may better abandon his claim at once than think of opposing a discharge.

BRADY, J.:

Several preliminary objections were presented at the hearing herein, many of which are not sustained by the proofs. It was shown, however, without objection, and remained without answer, that the petitioner presented a similar application to one of the judges of the Court of Common Pleas, which was fully heard and decided against him on the merits, and which decision remained in all respects undisturbed. The respondent invokes thereupon the doctrine of *res adjudicata*, and, if it be applicable, the order appealed from must be affirmed.

The authorities are to the effect that if the same proceeding be renewed, whether it be in the form of an action or summary or special proceeding, which has been once adjudicated upon the merits, such

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FIRST DEPARTMENT, MARCH TERM, 1877.

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result is a bar to any further proceeding of a similar character. *Demarest v. Darg*, 32 N. Y. Rep., 281; *White v. Coatsworth*, 6 id., 137; *Yonkers and New York Fire Insurance Co. v. Bishop*, 1 Daly, 449; *Powers v. Witty*, 42 How. P. R., 352; *People ex rel. Lodowick v. Akin*, 4 Hill, 606.)

The principle stated is a complete answer to the proceeding. It would not be in harmony with the doctrine of *res adjudicata* to permit such applications to be renewed as soon as decided against the insolvent, and thus continued from one judge to another, *ad infinitum*. The insolvent on such applications is given full opportunity to expose his case fully to the judicial mind, and the insolvent herein seems to have had such a freedom in the Court of Common Pleas.

The order appealed from must be affirmed, with ten dollars costs and the disbursements of the appeal.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

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THE PEOPLE EX REL. JOHN T. HANEMAN v. THE  
BOARD OF TAX COMMISSIONERS OF THE CITY  
AND COUNTY OF NEW YORK, RESPONDENT.

*Assessment for taxation — what property subject to — extent of the State authority over regulation of commerce with foreign States — duties on imports and exports.*

Upon an application by the relator to procure a review of an assessment of his personal estate made by the respondent, he set forth that his personal estate amounted to about \$125,000, which was "continuously employed in the business of exporting cotton from the United States to foreign countries." Such employment consisting in purchasing cotton in different States and exporting the same, and that as much as "\$115,000 was continuously invested in cotton of the growth of the United States, which had been cleared at a custom-house, and was on shipboard in course of exportation to some foreign State or country."

*Held*, (1) that the imposition of a tax upon the relator's capital in said business was not a violation of article 1, section 8, subdivision 3 of the United States Constitution, declaring that congress shall have power to regulate commerce with foreign nations and among the several States.

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FIRST DEPARTMENT, MARCH TERM, 1877.

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- (2) That it was not a violation of article 1, section 10, subdivision 2, prohibiting any State, without the consent of congress, from laying any impost or duties on imports or exports; and,
- (3) That it was not a violation of article 1, section 9, subdivision 5, providing that no tax or duty shall be laid on articles exported from any State.

CERTIORARI to review an assessment of the relator's personal property made by the respondent.

*H. Charles Ulman*, for the relator.

*J. A. Beall*, for the respondent.

DANIELS, J. :

The relator has been assessed the sum of \$60,000 for personal estate owned by him. He applied to the commissioners to vacate the assessment, for the reason that his personal estate, amounting in the aggregate to the sum of \$125,000, with the exception of the sum of \$5,500, consisted of money "continuously employed in the business of exporting cotton from the United States of America to foreign countries, through the customs department of the United States aforesaid; and that said employment consists in purchasing and paying for the cotton in different States of said United States, and actually exported by deponent in said business, and for the payment of the expenses of shipping the same as such exports." And it was further stated, that as much of his capital "as \$115,000 is continuously invested in cotton of the growth of the United States, which has been cleared at a custom-house, and is on ship-board in course of exportation to some foreign State or country." For these reasons, as they were set forth by the relator, it was claimed on his behalf that the assessment violated three provisions of the Constitution of the United States. The first of these provisions is that which has declared that congress shall have power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes." The second provides that "no tax or duty shall be laid on articles exported from any State;" and the third that "no State shall, without the consent of congress, lay any imposts or duties on imports or exports," etc. (Const. U. S., art. 1, § 8, sub. 3; § 9, sub. 5; § 10, sub. 2.)



The imposition of a tax upon capital can in no proper sense be affirmed to be a regulation of commerce. That has already been so frequently examined and uniformly declared as to render a particular discussion of the subject entirely needless. The authorities, very clearly, have determined that point against the relator in the present case. (*People ex rel. Pac. M. S. Co. v. Comrs. of Taxes*, 48 Barb., 157; S. C., 58 N. Y., 242; *Lott v. Mobile Trade Co.*, 43 Ala., 578; *Howell v. State*, 3 Gill, 14; *Reading R. R. Co. v. Pennsylvania*, 15 Wall., 284.)

In the decision of the last case it was said "that a tax upon any article of personal property that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage coach, a railroad car, or a canal or steamboat, its tendency is to increase the cost of transportation, still it is not a tax upon transportation or upon commerce, and it has never been seriously doubted that such a tax may be laid." (Id., 294.)

The principal reliance of the learned counsel for the relator was not placed upon this provision for the purpose of sustaining the invalidity of the tax in question, but his chief dependence was upon the other two prohibitions of the federal Constitution. It was very strenuously insisted that the tax contravened the provisions declaring that no tax or duty shall be laid on articles exported from any State, and no State, without the consent of congress, shall lay any imposts or duties on imports or exports. No direct authority has been cited maintaining the position which has been taken, that the tax designed to be imposed upon the relator is a tax, duty or impost upon exports. But a principle which will sustain it has been claimed to be deducible from the authorities, in which it has been very justly held that State taxes laid directly or indirectly upon imports were invalid, because they were forbidden by these provisions of the Constitution. The first, and the most notable of these cases is that of *Brown v. State of Maryland* (12 Wheat., 419); but the tax or impost in that case was, in terms, laid upon the business of the importer of foreign merchandise. The law required him to take out and pay for a license from the authorities of the State, in order to permit him to carry on and transact the business of an importer, and that it was held the State had no power to do,

because it was the same thing in effect as a tax upon the imports themselves. And this case would be comprehended by the principle there maintained, if a tax had been imposed upon the relator because of his business as an exporter of cotton. The case of *The People v. Moring* (3 Abb. Ct of Ap., 539) was held to be controlled by that authority, because the sales by brokers of foreign wines and ardent spirits, and all goods, wares, merchandise and effects imported from any place beyond the Cape of Good Hope, and all other goods, wares, merchandise and effects which were the production of any foreign country, were subjected to duties, payable into the treasury of the State for its use. (Id., 550.) The tax was not distinguished in its nature and effect from that condemned by the preceding authority. It acted directly upon the business of the importer, and it was therefore held to be nothing less than a tax upon the imports which might become the subjects of the sales designed to be regulated and controlled by the State laid.

The case of *Almy v. State of California* (24 How. [U. S.], 169) was decided under a law of a similar character enacted by the State of California. It, in terms, imposed a stamp tax on bills of lading for the transportation from any point or place in that State to any point or place without the State, of gold or silver coin, in whole or in part, or gold dust, or gold or silver, in bars or other form. (Id., 172), For that reason, it constituted a tax upon exports, and the law providing for it was held to contravene the provisions of the Constitution of the United States which have been already cited. The case of *Low v. Austin* (13 Wall., 29) was a direct attempt to impose a tax upon the imports themselves, and very much, as a matter of course, was held to share the fortune of the preceding controversies upon the same subject. The State law was held to be invalid, and the tax for that reason was set aside.

Each of these cases is clearly distinguishable from the one now before this court; for the tax imposed, held to be invalid, was either upon the articles themselves, or directly upon the business of the importer. For that reason, it involved either a direct or indirect attempt to violate the prohibitions of the United States Constitution; but in the present instance nothing of that kind was attempted or intended. No assessment was made upon, or of the property purchased and exported by the relator, nor upon the

business in which he was engaged. If that had been designed, the property he purchased or the business he carried on would, in terms, have been made the subject of the assessment; but, instead of doing that, not the remotest allusion was made in the commissioners' proceedings to either. It was his capital, as distinguished from what it might be invested in or from the business he transacted by means of it, which was made the object of the assessment; and that in no case has been held to be exonerated from State taxation by anything contained in the federal Constitution. The assessment was made upon it simply as so much personal estate, without reference to the advantages which might accrue to the relator by any means selected by him for its profitable employment. That use of it was not proposed to be assessed or taxed. It was regarded, as it was in fact, as so much property owned by him, and for that reason liable to taxation. In that respect, he was considered, for the purpose of taxation, in the same position as all the other inhabitants of the State owning personal property. And he was assessed simply as its owner, and neither directly nor indirectly because of the uses he might make of it. This money of which his estate consisted was not an export, and not intended for exportation. It was the property he purchased with it that acquired that character, when it was placed upon its journey to some foreign country; and that it was no part of the proceedings complained of to interfere with or restrain. The assessment was made because the relator was the owner of the money, and not because he might by means of it become the owner of commercial commodities for exportation. His liberty, or ability, profitably, to use it was in no manner infringed, but he was left entirely free in that respect.

Taxation upon capital used in commercial pursuits is by no means a novelty under the laws of the State. And where it has been restricted to that, it has not yet been considered a tax upon exports, even when the capital has been used and employed in business of that description. The principle which has been invoked to shield the relator, if it should be sustained, is one of a widely extended character. And it has been so often infringed in the business operations of the country as hourly to have generated legal controversies, if, in fact, it had been deemed to have been sanctioned by these provisions of the Constitution. They would not have failed to result in legal proceedings, if this

principle had any foundation whatever for its support. But actions of this description have not been instituted on that account; and they can have been omitted only because a tax imposed upon capital was considered distinguishable from one upon the articles in which it might be invested by its owner for foreign exportations. The agricultural and mineral products of the country have, to a very large extent, been purchased and moved by the investment and employment of the taxed capital of the exporter; and the imports made have been purchased and imported in a similar manner; and the rights of neither have been deemed to be infringed or violated, because the capital employed had been taxed as so much property belonging to its owner. If the relator can succeed, then it must follow that every person whose capital is wholly or partially employed in foreign commerce will be entitled to be relieved to a corresponding extent from taxation. And the same principle will practically comprehend the trade carried on between the States. No more serious blow could be given to the powers of the State to tax the property owned by its citizens; for, so far as it should not be employed in mere local traffic, it would all necessarily escape taxation. That would include all products shipped to foreign countries, or transported from one State into another, and all the importations made from abroad. So great an exemption as that has not been made by any thing contained in the Constitution of the United States. It has merely exonerated the articles themselves which may be exported or imported, but not the capital by means of which the title to them may have been acquired. The capital is one degree beyond the final limits of the prohibition that has been made upon this subject. The owner is protected in his title to it by the laws of the State in which he resides, and for that reason he becomes liable to taxation on account of it. That principle includes all property existing under the laws and sovereignty of the State. It was acknowledged in the justly memorable case of *McCulloch v. State of Maryland* (4 Wheat., 316), where it was held that the State might rightly tax the property owned within its limits by the United States Bank, while it could not the corporate functions of the corporation itself, because it was one of the fiscal agencies of the general government. It was there declared that the people of a State "give to their government a right of taxing

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FIRST DEPARTMENT, MARCH TERM, 1877.

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themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right." (Id., 428.) And the "sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission." And "all subjects over which the sovereign power of a State extends are objects of taxation." (Id., 429.) These general principles, maintaining the power of State taxation, were also sanctioned by the case of *Gibbons v. Ogden* (9 Wheat., 2). *Waring v. The Mayor* (8 Wall., 110), *Pervear v. Commonwealth* (5 id., 475), and *Howell v. The State* (3 Gill, 14) sustain the same position.

No authority has been found which would justify the court in extending exemptions from the power of State taxation, so far as to relieve the relator from the effects of the assessment made upon his capital in this instance, while the fair import of the terms used in the Constitution, and the construction given to them by the authorities in which they have been considered and applied, forbid such an extension of their legal effect. As already suggested, the assessment has been made merely upon capital, and not upon the exports purchased and moved by its instrumentality; and for that reason it was sanctioned by the authority of which the several States have been left in the free exercise and enjoyment. No other reason was urged before the commissioners or this court why the assessment made should be vacated, and as those already considered will justify no such result, it follows that the proceedings brought up by the writ should be affirmed, with costs.

DAVIS, P. J., and BRADY, J., concurred.

Proceedings affirmed, with costs.

CHARLES G. WATERBURY, RESPONDENT, *v.* JOHN A. BOUKER, IMPEADED WITH THE MAYOR, ETC., AND OTHERS, APPELLANT.

*Injunction — damages — order of reference to ascertain — right of party enjoined to.*

The plaintiff procured a temporary injunction restraining the defendant from proceeding with certain work. Upon the return of an order to show cause, the court refused to continue the injunction, and directed that the action be discontinued, without costs. Subsequently defendant moved for a reference to ascertain the damages sustained by the injunction, which motion was denied. *Held*, that this was error, and that the reference should have been granted.

APPEAL from an order denying a motion by the defendant Bouker for a reference, under section 222 of the Code, to ascertain the damages sustained by him by reason of an injunction which was granted in this action.

This action was brought by the plaintiff in part to restrain the defendants from interfering with or preventing the plaintiff from doing certain public work in the city of New York, and to restrain the defendants from doing or attempting to do any of such work.

On the 10th day of March, 1876, on the complaint in the action, Mr. Justice DONOHUE made an injunction order restraining the defendants, according to the prayer of the said complaint.

The plaintiff gave the usual undertaking on injunction with surety, which contained a provision for the ascertainment of damages by a reference or otherwise, as the court shall direct.

Upon the return of the order to show cause contained in the said injunction order, and on the 29th day of March, 1876, the defendant moved upon his answer to vacate the injunction.

The court reserved its decision on the motion until the 7th day of December, 1876, when it "ordered that the motion to continue said injunction be denied and the temporary injunction be and hereby is vacated, but with leave to the plaintiff to discontinue this action, without costs, and the plaintiff so electing in open court, it is further ordered that this action be and the same hereby is discontinued, without costs to either party as against the other."

The defendant Bouker thereupon, on an affidavit and order to

show cause, made a motion for a reference to ascertain the damages sustained by him by reason of the injunction order, which motion was denied.

*Edward H. Hobbs*, for the appellant Bouker.

*Albert Cardozo*, for the respondent.

DANIELS, J. :

It was held in this case that the plaintiff was not entitled to a continuance of the injunction, which was issued to restrain the performance of certain public work by the defendant, and leave was thereupon given the plaintiff, on his motion, to discontinue the action without costs. An order was entered for that purpose, and upon the usual affidavit a motion was made on behalf of the defendant for a reference to ascertain the damages sustained by him in consequence of the injunction. That is the usual course of proceeding under the circumstances presented. By the orders made denying the continuance of the injunction and discontinuing the action, it did finally appear that the plaintiff was not entitled to the injunction he had obtained. (*Hope v. Acker*, 7 Abb., 308; *Carpenter v. Wright*, 4 Bosw., 655; *Pacific Mail Steamship Co. v. Leuling*, 7 Abb. [N. S.], 37; *Park v. Musgrave*, 13 S. C. N. Y., [6 Hun], 223.) The proceedings in the action were completely ended, and in that respect the case differs from *Weeks v. Southwick* (12 How., 170), where the referee directed the complaint to be dismissed, but no judgment to that effect had been entered in the action. A reference after the final determination against the right of the plaintiff to the injunction is very much a matter of course, for the purpose of ascertaining the defendant's damages. (*Dunkin v. Lawrence*, 1 Barb. [S. C.], 447; *Coates v. Coates*, 1 Duer, 664, and *Park v. Musgrave*, *supra*). A denial of it in this case would be an inconvenient precedent in the way of the success of future applications of the same nature. If it should be sustained in this case it could be with the same propriety in all others, which would not fail to result in serious embarrassment to parties improperly restrained and enjoined.

In the present crowded condition of the Circuit calendars, a reference is by far the easiest and most expeditious course for ascertain-

ing the defendant's damages; and it has usually been quite uniformly adopted for that purpose in this class of cases. The defendant showed that he had sustained damages by reason of the restraint imposed upon him. He was not deprived of his right to recover them by the denial of costs, and justice requires that he should be allowed to pursue the ordinary course in establishing their extent. That practice has been provided for by the Code (§ 222), and it was sanctioned by the course of proceeding followed in the late Court of Chancery. The plaintiff showed no good reason why the defendant should not be allowed to avail himself of its benefits in this case.

The order should be reversed with ten dollars costs, and the reference ordered which was applied for. The order will direct reference to Hon. DANIEL P. INGRAHAM.

DAVIS, P. J., and BRADY, J., concurred.

Order reversed, with ten dollars costs. Reference ordered to Hon. DANIEL P. INGRAHAM.

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THE BREWERS AND MALTSTERS' INSURANCE COMPANY AND OTHERS, RESPONDENTS, v. JOHN R. DAVENPORT AND WILLIAM R. WALKER, ASSIGNEES IN BANKRUPTCY, ETC., APPELLANTS.

*Bankruptcy — effect of adjudication on attachment — Action of interpleader — of assignee in bankruptcy with creditor of bankrupt — jurisdiction of State courts over.*

One Davenport, having commenced an action against a corporation created in the State of Missouri, procured an attachment to be issued therein, on the 15th of September, 1873, under which a debt due from the plaintiff to the said corporation was attached. On the 3d of November, 1873, Davenport recovered judgment in the said action and issued execution thereon. On the second of October a petition in bankruptcy was filed against the corporation in Missouri, and on the eighth of November it was duly declared bankrupt.

Davenport and the assignee in bankruptcy each claiming the money, the plaintiff brought this action, praying that the court would decide which of the two were entitled to receive the same. *Held*, that as the attachment was issued within four months of the filing of the petition, it was annulled by the subsequent adjudication, and that the assignee was entitled to the money.



*Held*, further, that this was not an action to recover assets belonging to the estate of the bankrupt within the meaning of the amendment of the bankruptcy act of 1874, depriving the State courts of jurisdiction over such action, but was brought to secure a decision binding on the contesting claimants, declaring to which of them the debt could lawfully be paid, and that this court had jurisdiction over the same.

APPEAL by the defendant William R. Walker, as assignee in bankruptcy, from a judgment entered on the report of a referee in favor of the defendant John R. Davenport.

*William E. Stiger*, for the appellant.

*R. E. Deyo*, for the respondent.

DANIELS, J. :

The plaintiffs in this action were and are three insurance corporations, associated together under the name of the Inland Insurance Union. They were indebted in the sum of \$935 to the North Missouri Insurance Company, which was a corporation created by and existing in the State of Missouri. The latter company was indebted to the defendant John R. Davenport, who, on the 15th of September, 1873, in an action then commenced by him for the recovery of his debt, by a warrant of attachment issued in that action, seized and attached the debt owing from the plaintiffs to that company. While that action was pending, and on the 2d day of October, 1873, a petition in bankruptcy was filed with the clerk of the United States District Court for the eastern district of Missouri against the North Missouri Insurance Company. After the commencement of that proceeding, and on the 3d day of November, 1873, the defendant Davenport recovered and entered judgment in the action commenced by him, and execution was at the same time issued upon it to the sheriff of the county of New York. On the 8th of November, 1873, which was five days after the defendant Davenport recovered his judgment and issued execution upon it, the North Missouri Insurance Company was declared a bankrupt, in the proceeding instituted by the petition filed on the second day of the preceding October. The defendant William R. Walker was regularly appointed assignee of the bankrupt, and on the 23d of

March, 1874, an assignment was executed to him by a register in bankruptcy residing in the eastern district of Missouri, by which all the real and personal estate of the bankrupt, including all the property of whatever kind possessed by, or in which it was interested, or entitled to have, on the day when the petition was filed, was assigned to him. Under and by force of that assignment the assignee claimed the moneys owing from the plaintiffs to the bankrupt. A portion was also claimed by another defendant, who finally practically abandoned the claim made by him; and the entire debt was also claimed by the defendant Davenport under his attachment, the judgment recovered by him, and the execution issued upon it. The plaintiffs commenced this action thereupon to secure the determination of this court upon the rights of the adverse claimants, and the money has been placed in its custody for payment to the party appearing to be entitled to receive it. The referee held that it was legally payable to the creditor under the attachment and the judgment, and from that determination the assignee in the bankruptcy proceedings has taken the present appeal. The correctness of the decision which has been thus brought in question depends upon the construction which should be given to the provision contained in the bankrupt law, declaring the effect of the assignment made under its authority. That seems to be the same now that it was before the revision of the United States statutes, and it was enacted in the following terms: "As soon as an assignee is appointed and qualified, the judge, or where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings." (U. S. Rev. Stats., 980, § 5044.) To be avoided by means of this provision of the statute, it was held, upon the trial, that the property seized must be held under the attachment at the time of the execution of the assignment in

bankruptcy. But that, it is evident, would wholly defeat the operation of the provision made by this section, declaring that the assignment shall relate back to the commencement of the proceedings in bankruptcy. The object of the provision was to render it effectual as of that time, and the succeeding reference relates to the same period. The time of the commencement of the proceedings is the plain antecedent of the following phrase; and it is property then held by attachment on mesne process that was designed to be discharged from such process and vested in the assignee. That was the time, as it was plainly mentioned, at which the assignment was to transfer all the property of the bankrupt, and to render that effectual, the dissolution of the attachment at that time existing was a clear necessity. This construction has been given to this section of the statute in a number of instances, and it has been uniformly held that the assignment took effect upon the bankrupt's property by way of relation, as of the time when the proceedings had been commenced by the filing of the petition. That would not be done if the provision upon this subject could be defeated by the recovery of a judgment in the meantime; and for that reason these authorities in principle are directly in conflict with the position on which this case was disposed of by the referee. (*Pennington v. Lowenstein*, 1 Bankruptcy Reg. R., 570 [1st ed., p. 157]; *Matter of Housberger*, 2 id., 92 [1st ed., p. 33]; *Miller v. Bowles*, 58 N. Y., 253.) The cases of *Miller v. O'Brien* (9 Bankruptcy Reg. R., 26) and *Dickerson v. Spaulding* (14 S. C. N. Y. [7 Hun], 288,) are more nearly in point, and they seem to dispose of the case now before the court. .

The recovery of the judgment made no change in the rights of the parties to the property, because it was held by force of the attachment alone, when the proceedings in bankruptcy were commenced, and that was dissolved by the assignment as soon as it was delivered. Neither the judgment nor the execution could be a lien upon the property, because it was not capable of being the subject of levy and sale. Being a mere indebtedness, it was incapable of manual delivery, and could only be attached by the delivery of a copy of the attachment with the prescribed notice to the debtor; and if not voluntarily paid after judgment, it could only be recovered by an action prosecuted for that purpose. (Code, 232, 235, 237, subds. 4, 238.)

The money never found its way into the hands of the attaching creditor, and he lost his right to recover it when his attachment was dissolved by the relation and effect of the assignment. The mere recovery of a judgment after the filing of the petition cannot be held to improve the condition of the creditor. A judgment preceding that event stands upon a different principle, and when unaffected by bad faith may be enforced against the property of the bankrupt. (*Wilson v. City Bank*, 17 Wall., 473.)

It has been claimed on the part of the respondent that the act of 1874, amending the bankrupt act, has deprived the State courts of all jurisdiction over contests of this nature. But to hold that, would not entitle the respondent to the money in dispute, for the proceedings which are shown to have been had have deprived him of the right to demand and receive the proceeds of the debt he had attached. The court was certainly competent to decide that portion of the controversy, notwithstanding the change which has been made by this amendment of the law.

But this was not an action for the recovery of the assets of the bankrupt, and for that reason not within the inhibiting language of the amendment. It was prosecuted for the purpose of procuring a judgment of this court, declaring to whom of the conflicting claimants the money placed in its custody by the plaintiffs should be paid. The action was not for the collection of the assets of the estate, within the terms used for that purpose in the bankrupt law, but merely to secure a direction binding on the contesting claimants, declaring to whom the debt could be lawfully paid; and it is only when it may be prosecuted to collect the assets of the bankrupt that the recent amendment has conferred exclusive jurisdiction upon the District Courts of the United States. But without infringing upon its terms the debtor is still at liberty to apply to this court for its determination as to the proper party to receive a debt wholly created and arising under the laws of the State. The plaintiffs had a certain sum of money to pay to some person, and desired to place it under the control of the court, to be paid to the person appearing entitled to receive it, and in that way to relieve themselves from all responsibility on account of it. They neither claimed to collect nor contest any thing, but simply to be allowed to place the fund where the person actually entitled to have it could receive it. The case, for

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FIRST DEPARTMENT, MARCH TERM, 1877.

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these reasons, was entirely different from that of *Olcott v. Maclean*,\* previously argued and already considered; and it is within the reasoning upon which the jurisdiction of the State court was affirmed in the case of *Cook v. Whipple* (55 N. Y., 150). It belonged to a class of cases over which the general jurisdiction of this court extended, independently of the bankrupt law; and its powers in that respect have not been in terms or by implication contracted by any thing contained in the amendments of 1874. (U. S. Rev. Stats., 969, § 4972; Laws of congress 1874, chap. 390, § 2.)

Upon the facts found by the referee, the respondent Davenport was not entitled to the money which the plaintiffs had paid into court as the proceeds of the debt owing by them to the bankrupt; and as the proceedings and assignment deprived him of that right, it necessarily followed that the judgment should have directed that the assignee was the proper person to whom payment could be lawfully made. His receipt of it will fully exonerate the plaintiffs, and the determination made against the claim of the defendant Davenport will be forever conclusive against his title. The judgment should, therefore, be reversed and judgment to the effect already indicated entered upon the report of the referee.

DAVIE, P. J., and BRADY, J., concurred.

Judgment reversed and judgment ordered on the report of the referee, as directed in opinion.

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IN THE MATTER OF THE PETITION OF CATHARINE A. DURKIN  
TO VACATE AN ASSESSMENT, ETC.

*Vacating an assessment in New York — failure of city authorities to designate "corporation paper" — duty of clerks of common council, as to publication.*

Where, upon an application to vacate an assessment in the city of New York, it appeared that, at the time of the passage of the ordinance directing the work to be performed, there were no newspapers lawfully designated by the city authorities in which to publish municipal proceedings, though the law required that such designation should be made, *held*, that as the law required the clerks

\* See *post*, page 277.

of the boards of aldermen to publish such resolutions and ordinances, they could, in case the city authorities neglected to designate any corporation papers, publish the same in any newspaper published in the said city.

APPEAL by the mayor, etc., of the city of New York from an order vacating an assessment for the expenses of repaving Thirty-third street with Belgian pavement, from Sixth to Tenth avenues.

*J. A. Beall*, for the appellant. .

*Irving Ward*, for the respondent.

DANIELS, J. :

The first assessment was made in 1852, for paving, resetting curb and gutter and flagging stones, between Sixth and Seventh avenues, and it was shown to have been paid in April, 1852. The last assessment was for the expense of paving the street with Belgian pavement, from Sixth to Tenth avenues. The resolution directing the work was passed by the board of assistant aldermen on the 14th of June, 1870, and by the board of aldermen on the twenty-third of August following; and it was approved by the mayor on the twenty-sixth of that month. At that time the designation of newspapers for the publication of municipal notices, under the act of 1867, had ceased to be operative, and no effectual designation had been made under the act of 1868. For these reasons, publication of this ordinance was not required in either of the newspapers employed under the act of 1867; or which might have been, but were not employed under the act of 1868. Consequently, proof of the failure to publish in the newspapers employed in 1867 did not render the ordinance or resolution providing for the second pavement invalid.

But it was claimed that the failure to publish notice of the proceedings in the newspapers required to be designated by section 1 of chapter 383 of the Laws of 1870, must be attended with that result. The evidence proved that no designation of newspapers had been made, as that section of the statute required it to be done, when this ordinance or resolution was introduced and acted upon by the boards of aldermen and assistant aldermen, and was approved by the mayor. For that reason, publication in such newspapers was an actual impossibility, and yet publication had been positively required by a pre-

ceding act. That could not be complied with in any way if publication in newspapers designated by the city authorities was what the law was designed to require, for there were no such newspapers in existence. The designation made under the act of 1867 had expired. That which was attempted under the act of 1868 was never effectually completed, and none whatever had been made under the act of 1870. And still, by a preceding law, it had been made the duty of the clerks of the respective boards of aldermen to make the publication. When that duty was created there were no corporation papers whatever designated, in which municipal proceedings could be or were required to be published. And as the clerks had been subjected to the duty of making publication of the resolutions and ordinances, they could not be absolved from a failure to discharge it by reason of that circumstance. The result of this state of things was that they could lawfully publish them in any newspaper published in the city. That would comply with what the act of 1870 declared it to be the duty of the clerks to do. (Vol. 1, Laws of 1870, 369, chap. 137, § 20.)

This state of things continued until chapter 383 of 1870 went into effect, which provided that newspapers should be designated, and that these proceedings should be published in them. But as that could not be done until the designation should be made, and the duty to make publication was an absolute one, the clerks were at liberty to continue it in the same way that it could be done by them before chapter 383 went into effect. The failure to perform the duty, providing that a designation of newspapers should be made, did not discharge the clerks from the performance of that which had been positively imposed upon them, and for those reasons it is not to be presumed, without evidence, that no such publication as was required was made of the ordinance or resolution providing for this improvement. That was the conclusion arrived at in the *Case of Peugnet* (12 S. C. N. Y. [5 Hun], 434), under circumstances similar to those shown in support of this application. And the *Case of Levy* (11 id., 501), relied upon by the petitioner's counsel, is entirely consistent with this result; for it appeared there that no publication of the ordinance or resolution had been made. The want of publication was not established in this case, and as that was the only irregularity relied upon, the case of the petitioner was not made out. The order appealed from should

be reversed, and a rehearing of the case directed, with the usual costs to the appellants to abide the event.

DAVIS, P. J., concurred.

Present — DAVIS, P. J., BRADY and DANIELS, JJ.

Order reversed, rehearing ordered, ten dollars costs to appellants, to abide event.

CATHARINE E. COLLINS, RESPONDENT, v. CHARLES E. COLLINS, APPELLANT.

*Alimony — what amount allowed — Appeal.*

Upon an application by a wife for a divorce, the court will not, as a rule, award to her, for alimony, more than one-third of her husband's entire estate.

Although, upon an application for temporary alimony the court may, when but a short time intervenes between the application therefor and the order granting the same, direct that it be paid from the time the application was made, yet when the interval is a long one, *e. g.*, seven years, during which time the wife has succeeded in supporting herself, alimony should only be allowed from the date of the order.

Upon an appeal from order granting temporary alimony in an action for a divorce, the General Term has power to modify the order by reducing the amount allowed thereby.

APPEAL from an order allowing plaintiff temporary alimony, and directing defendant to advance to her counsel the sum of \$250.

A motion was made in this action, in June, 1869, for an allowance for plaintiff's support and the expenses of this action. The matter was referred to a referee, and in August, 1875, a report was made that the application should be denied. On the report the following order was made :

"It is ordered that the plaintiff be allowed sixty dollars per month alimony, to date from the service of the papers on the motion for alimony, and that the defendant forthwith pay over to the plaintiff the amount of such alimony now due, and continue the payment



hereafter of said sum of sixty dollars per month, from month to month, until the further order of this court.

"And it is further ordered, that the defendant forthwith pay over to the plaintiff's counsel the sum of two hundred and fifty dollars, as counsel fees."

*Cephas Brainerd*, for the appellant.

*John McKeon*, for the respondent.

DANIELS, J.

The parties, with Charles S. Dewing, as trustee for the plaintiff, entered into articles of separation on the 4th day of September, 1868. The defendant then paid over, for her sole use and benefit, the sum of \$5,000 in cash, and conveyed three lots of land in San Francisco to her trustee for her separate use; and he thereupon conveyed them to her. By the articles subscribed, this money and land were to be received by her in full satisfaction of all further claims upon the defendant or against his estate. Soon after that, but at what particular time does not appear, this action was commenced against the defendant for a divorce, because of adultery. The complaint was verified on the 27th of March, 1869, and the action, for that reason, may be presumed to have been commenced near that date. About the same time notice of the motion was given, upon the final hearing of which the order appealed from was made. On the 30th of June, 1869, a reference in it was directed for the purpose of ascertaining a proper sum to be paid for alimony and counsel fee, during the pendency of the action. The hearing was commenced in July, 1869, and proceeded from time to time to the year 1875, and on the eleventh of August of that year the referee made his report. He held that the articles of separation were legally binding upon the plaintiff; that the three lots of land conveyed were worth \$4,500; and that they and the money paid formed a suitable provision for the plaintiff's support. By the tenor of the report, it appears that the defendant was not a person of large property, and that he had an imbecile sister dependent upon him. An examination was made of his books, during the progress of the hearing before the referee, from which the plaintiff's counsel insisted it

had been made to appear that the defendant was possessed of what might be deemed a reasonable competency ; but that cannot be fairly deduced from the evidence on which the application was finally heard and determined. It is most probable that all his estate would not exceed the sum of from twenty-five to thirty thousand dollars ; and it is by no means certain from the evidence that it will equal either of those amounts. The probability is quite decided that the plaintiff received what was the equivalent of about one-third of the defendant's property. He had been in business in this city and in California, but the expenses of the business in both places were very large, and they rendered it unremunerative. The oral evidence was clear that the business proved a losing one, and the books do not satisfactorily show its condition to have been different. It did not appear that the defendant owned other property, except the three lots and a policy of insurance upon his life, surrendered to the company for less than \$3,000, its estimated value at the time.

It seems quite probable that the amount received by the plaintiff was very near, if not quite, one-third of the defendant's entire estate ; and ordinarily the courts do not feel at liberty to go beyond that for the purpose of providing support and maintenance for the defendant's wife in actions of this nature ; though cases have arisen where the decree has given the wife half of the husband's estate. That, however, is not usual, and has not been considered entirely proper, because her legal interest in his property at his decease is, under ordinary circumstances, limited to one-third of his personal estate and dower in the realty owned by him.

For these reasons, apparently, the referee concluded that no further provision should be made for her during the pendency of this action. The motion was brought on for final hearing in 1876, and in June of that year an order was made directing the defendant to pay over to the plaintiff for her support, the sum of sixty dollars a month, from the time the motion papers were served until the further order of the court, and \$250 as counsel fees. At that time these monthly installments aggregated a sum exceeding \$5,000, and with the money previously paid and the property conveyed, probably equaled one-half of the defendant's entire estate. This was more than would ordinarily be secured by a final decree ; and if the order should be maintained it would be likely to render any further proceedings on

behalf of the plaintiff for the determination of the action undesirable ; which is a result that it is not the policy of the law to promote. Alimony, during the pendency of the action, is not provided for that purpose ; hence it has been limited to a mere support of the wife during the pendency of the suit prosecuted by her, and a sufficient sum to enable her to bring her cause on for trial. The object of the law is to place her in a condition for testing the truth of her complaint, and vindicating her rights as against her husband ; and when the allowance so far exceeds what may be necessary for that purpose as to become oppressive upon the husband, it has a direct tendency to exclude him from a hearing before the courts. It is a practical condemnation of him without a hearing upon the allegations of guilt, and for that reason not consistent with an impartial administration of the law. While the wife is required to be provided for, the husband is not to be so far impoverished as to render him incapable of presenting what may prove to be an entirely justifiable defense.

The learned justice who finally heard and decided the motion probably did not have his attention directed to the length of the intervening period which had elapsed since the service of the motion papers. Ordinarily, that will not exceed a few weeks, or months at farthest ; and there will then be no impropriety in giving the allowance a corresponding direction. But in this case the time exceeded seven years, and for that reason it rendered the payment required by the order, greater than the exigencies of the case could, in any view of them, require. The plaintiff has supported herself through these intervening years, and if she has become dependent again upon the property of her husband, the allowance should not exceed what her present necessities may require. The object is not to make provision for the past, but to maintain and support her until, with the observance of reasonable expedition, her action can be tried and determined.

The defendant's counsel has strenuously objected to any allowance, because he has denied the validity of the marriage ; but the necessity of her position is as much entitled to be relieved, when that may be an attribute of her legal controversy with her alleged husband, as it has been held to be when it arises wholly out of the charge of his marital guilt. The controlling fact is, that the wife has become

engaged in a legal controversy with her alleged husband, which her own financial condition will not enable her to properly present for determination; and to relieve her from that embarrassment, the defendant has usually been required to supply her deficiencies. The reason of the rule renders it as applicable to a controversy presenting the legal validity of her marriage, as to one limited to her vindication against the consequences of her husband's misconduct. The agreement for their separation, if properly entered into, did not preclude her from prosecuting the defendant for a divorce, if she afterwards discovered that he had been guilty of adultery. That was a contingency not contemplated when the articles were executed. The law secured that right to her, even if she had legally bound herself to live separate and apart from him. In the present case she has gone further than to assert the existence of that cause of action. She has added to that the averment of the invalidity of the articles themselves; and she has the right to establish the truth of that allegation, if she shall be able to do so, for the purpose of claiming further relief than that already obtained by means of them, from the defendant's property. And to enable her to maintain that, as well as the other positions taken by her, he may be required to relieve her temporary wants until that can be accomplished by a trial to be had in the action.

The case was one requiring that the defendant should provide for the plaintiff's present necessities; but that can be done without obliging him to submit to the terms mentioned in the order. If her necessities had been pressing, it is not probable that this long delay would have been allowed to intervene between the service of notice and the final hearing of the motion. That of itself presents presumptive evidence that she has not been long dependent upon further pecuniary relief from her alleged husband; and in view of that circumstance and those the evidence tended to establish, the allowance should be simply prospective from the time when the order was made. That will not be unjust to the defendant, because he may bring the cause on for trial and terminate the demand made upon him by an early vindication of his innocence, if that shall prove to be the truth.

There is no foundation for the objection that the order is not one which can be reduced in its amount upon an appeal. The case of

*De Llamosas v. Llamosas* (62 N. Y., 618) holds no such doctrine. What was said in its decision applied only to the power of the Court of Appeals. In the General Term all orders affecting substantial rights are the subject of review (*Hanover Ins. Co. v. Tomlinson*, 58 N. Y., 215), and an order directing the payment of money has been held to be of that description. (*People v. N. Y. Cen. R. R. Co.*, 29 N. Y., 418.)

The order made in this case should be so far modified as to limit the monthly payments to the time succeeding the date when it was made. As to the counsel fees, no change is required in their amount, and as modified the order should be affirmed, without costs to either party.

Order to be settled by DANIELS, J., on two days' notice.

DAVIS, P. J., concurred.

Present — DAVIS, P. J., BRADY and DANIELS, JJ.

Order modified as in opinion directed, and affirmed as modified, without costs; order to be settled by DANIELS, J., on two days' notice.

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GEORGE M. OLCOTT, ASSIGNEE, ETC., RESPONDENT v. JOHN  
MACLEAN AND OTHERS, APPELLANTS.

*Assignee in bankruptcy—action to recover assets of bankrupt—in what court it must be brought—jurisdiction of State court—of United States District Court—when exclusive—§ 2 of chap. 390 of act of congress of 1874.*

By section 2 of chapter 390 of the act of congress of 1874, providing "that the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt \* \* \* shall, when such debt does not exceed \$500, be collected in the courts of the State where such bankrupt resides," the United States District Court is vested with exclusive jurisdiction over all actions brought by an assignee to recover property alleged to have been transferred by the bankrupt in violation of section 5128 of the United States Revised Statutes, where the value of such property is greater than \$500.

Although prior to the passage of the act of 1874 the State court had concurrent

jurisdiction with the United States District Court over such actions, yet by the passage thereof such jurisdiction was withdrawn from it, even as to actions theretofore commenced and then pending therein.

APPEAL from a judgment in favor of the plaintiff recovered on the verdict of a jury for \$1,320.63, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

*George A. Black*, for the appellants. By the enactment of the Revised Statutes of the United States on June 22, 1874, the jurisdiction of the United States courts became "exclusive" over actions of this character. (*Vide* R. S. of U. S., § 711, subd. 6, p. 134; § 4972, p. 969; act of congress, 1874, chap. 390, § 2.) The pendency of this action at the time the act of June 22, 1874, was passed is no reason to except it. (*Butler v. Palmer*, 1 Hill, 330; *Matter of Palmer*, 40 N. Y., 561; *Frost v. Hotchkiss*, 1 Abb. New Cas., 27.) The cases in which the courts of this State have considered the effect of the "exclusive jurisdiction" granted to the United States courts by act of congress are not very numerous. They are, as to consuls: *Davis v. Packard* (6 Wend., 327); *Davis v. Packard* (10 id., 50); *Davis v. Packard* (8 Peters, 41); *Davis v. Packard* (7 id., 276); *Davis v. Packard* (8 id., 314); *Valarino v. Thompson* (7 N. Y., 576). As to States: *Delafield v. State of Indiana* (26 Wend., 215; 2 Hill, 159). As to postmasters: *Hall v. Felton* (1 N. Y., 544; 12 How. [U.S.], 284). As to admiralty: *In re Josephine* (39 N. Y., 25); *Brookman v. Hamill* (43 id., 555); *Brookman v. Hamill* (46 id., 636; *Vose v. Cockcroft* (44 id., 415). As to infringement of patents: *Dudley v. Mayhew* (3 N. Y., 9). As to pilotage: *Cisco v. Roberts* (36 N. Y., 35); *Com. of Pilots v. Pacific M. S. S. Co.* (52 id., 609); *Henderson v. Spofford* (59 id., 131). In all these cases the power of congress to create the remedy or right and confine its exercise to its own courts is recognized. (*Lathrop, Assignee, v. Drake*, 13 Bank. Reg., 472.) Having no jurisdiction, the judgment must be reversed absolutely, and with costs. (*Ayres v. West. R. R. Co.*, 45 N. Y., 260; 49 id., 660; *McMahon v. Mut. Benefit Ins. Co.*, 3 Bosw., 644.)

*William P. Chambers*, for the respondent.

DANIELS, J. :

The verdict in this case was rendered for the value of certain goods received by the defendants from James S. Aspinwall. The same goods had been sold by the defendants and shipped by them, at London, to him in New York. The shipment was made on the last day of October, 1872, and he received the goods in November following. The 5th or 6th of December, 1872, he suspended payment, and did not afterwards resume. He was insolvent at that time, and on the 27th day of January, 1873, petitioned for the benefit of the bankrupt law. Before doing that, and on the tenth day of the month preceding, he delivered to the defendants' agent, at New York, an instrument in writing, by which he stated that he held part of the goods in store for account of the defendants. And on the 7th day of January, 1873, in compliance with orders drawn upon him by the defendants' agent, he delivered to such agent those goods and others shipped with them by the defendants. The plaintiff was appointed assignee in the bankruptcy proceedings on the 25th of February, 1873. And after demanding these goods from the defendants, he commenced this action for the recovery of their value. An attachment was issued and the property attached under it. The defendants thereupon appeared by attorney in the action. It is not necessary to examine into the merits of the objection urged, that the attachment was an irregular proceeding, for that point cannot properly be made in the present state of this action. The appearance itself gave the court jurisdiction over the persons of the defendants, and it is too late now to object that it was irregularly secured. (*Brown v. Nichols*, 42 N. Y., 26.)

When the goods were received by Aspinwall, as they appear to have been in November, he became their absolute owner. His title was complete, and nothing was done by him to divest it until after he had become insolvent and suspended payment. For that reason, it was insisted by the plaintiff that the return of the goods to the defendants' agent was in fraud of the bankrupt act, and entitled him to a recovery of their value as the assignee. Their value was shown to have exceeded the sum of \$1,300, and, for that reason, it was objected that the change made in the law in 1874 deprived this court of jurisdiction over the controversy. When it was commenced in 1873, it was settled by authority that this court had juris-

diction over such an action brought by an assignee in bankruptcy. (*Cook v. Whipple*, 55 N. Y., 150.) But during its pendency, and before the trial, the law defining the powers of the United States District Courts over the collection of the assets of the bankrupt was amended by the addition of the proviso: "That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed \$500, be collected in the courts of the State where such bankrupt resides, having jurisdiction of claims of such nature and amount." (Laws of 1874, 178, § 2.)

The cause of action relied upon for a recovery in this case arose out of an alleged violation of the provision of the bankrupt law, declaring, as it has been amended, "that if any person, being insolvent or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered or seized on execution, or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and knowing that such attachment, payment, pledge, assignment or conveyance is made in fraud of the provisions of this title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited." (U. S. Revised Statutes, 996, § 5128; Laws of Cong. of 1874, p. 180, § 11, sub. 1.)

It was literally, therefore, a case arising under the laws of the United States that this action was brought upon; and for that reason, the exclusive jurisdiction of the United States courts could be constitutionally extended over it by act of congress. (U. S. Const., art. 3, § 2, sub. 1.) And it appears that it was the intention of the amendment enacted in 1874, and already mentioned, to accomplish that result; for by providing that actions for the collection of debts, not exceeding in amount the sum of \$500, might



be allowed to be prosecuted in courts of the State where the bankrupt resides, having jurisdiction of claims of such nature and amount, it was designed that it should be understood that the State courts should be limited and restricted to that class of cases arising under the provisions of the bankrupt law. Enumerating the cases that might be prosecuted in such courts, excluded all others not included by the import of the terms made use of. That is a well-settled rule of construction, and it has been long applied to the interpretation of statutory provisions. By the terms made use of, a negative is implied and understood beyond the power actually declared. As the section of the act has been amended, it now provides that the jurisdiction of the District Courts of the United States, as courts of bankruptcy, shall extend, among other enumerated cases, to those for the collection of all the assets of the bankrupt, except actions for the recovery of debts not exceeding \$500, which may be directed by the District Court to be collected in the courts of the State where the bankrupt resides, having jurisdiction of claims of that nature. (U. S. Revised Statutes, 969, First Session; Laws of 1874, 178, § 2.)

Beyond the limits of that exception, the jurisdiction of the District Courts has been made exclusive of the courts of the State. That is the import of the terms made use of, and it is also the effect of the construction placed upon such provisions of statutory law. (*Dudley v. Mayhew*, 3 Comst., 9, 15, 18.)

This change in the law deprived the State courts of all other authority than that mentioned in it, over actions of this description as soon as the provision went into effect, and that was long before this action was tried. There was nothing in the saving provisions of the Revised Statutes which prevented it from including pending actions. They simply restrained the effect of the repealing clauses contained in the revision then made. (U. S. R. S., p. 2, § 13; p. 1091, § 5597.)

That is entirely evident from the last section of the statutes, for it declares that all acts passed since the 1st day of December, 1873, are to have full effect, as if they were passed after the enactment of the revision as subsequent statutes, and as repealing any portion of the revision inconsistent therewith. (Id., 1092.) And the force of that general provision has not been restrained by any thing con-

tained in the preceding thirteenth section, for that simply saves the liability of the party, and not the proceedings taken to enforce it; besides, this was not the repeal of any existing law. It had not before been provided that the courts of the State should entertain jurisdiction over actions of this description; but the exclusive powers of the district courts had not been so far extended as to deprive the State courts of their powers in this respect, and for that reason, it was held that actions of this description could be prosecuted before them. It was because congress had not acted at all upon the subject that their jurisdiction remained unaffected. That omission was supplied by the amendment of 1874, and its effect was at once to abridge the powers of this court to such an extent as to deprive it of all authority over the present action from the time that amendment became operative as the law. The law in this respect is similar to a change considered by the court in *Insurance Company v. Ritchie* (5 Wall., 541), where an act passed in 1866 declared that a preceding act passed in 1833 should not apply to such a case. And the chief justice, in his opinion upon the effect produced by the subsequent act, said: "This is equivalent to a repeal of an act giving jurisdiction of a pending suit. It is an express prohibition of the exercise of the jurisdiction conferred by the act of 1833 in cases arising under the internal revenue laws. It is clear that when the jurisdiction of a cause depends upon a statute, the repeal of a statute takes away the jurisdiction. And it is equally clear that where a jurisdiction conferred by statute is prohibited by a subsequent statute, the prohibition is so far a repeal of the statute conferring the jurisdiction." (Id., 544.) The same principle was also maintained in the case of *The Assessor v. Osbornes* (9 id., 567). It was there held that the repeal of a statute withdrew the jurisdiction it conferred upon the courts; and where it contains no saving clause, "all pending actions fell, as the jurisdiction depended entirely upon the acts of congress." (Id., 575.) That was the effect of the amendment made in 1874. It withdrew from the courts of the State the authority over these cases, which had previously been maintained only because congress had not directly or indirectly prohibited it, and confined the jurisdiction from that time to the district courts, except when actions, by their permission, should be brought for the recovery of debts owing to the

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FIRST DEPARTMENT, MARCH TERM, 1877.

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bankrupt, not exceeding in amount the sum of \$500. This was not a demand of that limited nature, and, consequently, not within even this exceptional authority.

As the power of this court to hear and determine this case has been withdrawn, it is unnecessary to examine any of the other objections to the recovery on the part of the defendants. They do not seem to be tenable, because all the property was neither transferred nor delivered by the bankrupt before the seventh day of January; but their further consideration should be dispensed with, because of the present want of power in the court to decide them in this case.

The judgment should be reversed and the complaint dismissed, but as that has become necessary because of the legislation which took effect during the pendency of the action, it should be without costs.

i AVIS, P. J., and BRADY, J., concurred.

Judgment reversed and complaint dismissed, without costs.

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THE PEOPLE EX REL. ELLEN M. DOUBLEDAY, APPELLANT,  
v. JOHN KELLY, COMPTROLLER OF THE CITY OF NEW YORK,  
RESPONDENT.

*Redemption from tax sales in the city of New York — chap. 274 of 1876.*

Chapter 274 of 1876, providing that, at any time within one year after the passage of the act, any person might pay to the comptroller of the city of New York the amount of any tax upon property belonging to such person theretofore imposed and *then remaining unpaid*, together with interest at seven per cent per annum, for the time that such tax was imposed, only applied to cases in which the taxes had not as yet been paid to the public authorities, and did not provide for the redemption of property previously sold for the non-payment of taxes, the time to redeem which had not as yet expired.

APPEAL from an order denying a motion that a writ of peremptory mandamus issue out of the Supreme Court, directed to, and commanding Andrew H. Green, as comptroller of the city of New York, to receive from the relator herein the sum of \$794.50 with interest thereon at the rate of seven per cent per annum, from the 17th day

of September, 1869, to the time of the payment; and the further sum of \$900, with interest thereon at the rate of seven per cent per annum, from the 19th day of September, 1870, to the time of payment, and upon such payment to make and deliver to relator a receipt therefor and to forthwith cancel the record of the taxes for the year 1869 and the year 1870, imposed upon the property of the relator, which was more particularly described in her affidavit.

*James A. Deering*, for the appellant. Assuming that the tax sale was valid, yet the taxes in question were "now remaining unpaid." Within the definition of the word "payment," as used in the tax law and the act of 1876, a tax remains unpaid until actually paid by the owner of the land, and the record of the tax and sale has been canceled by the proper officer. (*Williams v. Townsend*, 31 N. Y., 411; *Fitzpatrick v. Flagg*, 5 Abb. Pr., 213; Laws 1853, chap. 579, § 16.)

*J. A. Beall*, for the respondent. The taxes have been paid and the comptroller has no authority to receive them a second time. (Hilliard on Taxation, 484, § 2; Blackwell on Tax Titles, 646-650.) If the act of 1876 invalidates sales for taxes and leases made and delivered in pursuance of such sales, then the act impairs the obligation of contracts, and is void as in conflict with subdivision 1 of section 10, article 1 of the Constitution of the United States. (*Dikeman v. Dikeman*, 11 Paige Ch., 484; *Bruce v. Schuyler*, 4 Gilm. [9 Ill.], 274-278; *Nelson v. Rountree*, 23 Wisc, 368, 371; *Dolan v. Trelevan*, 31 id., 151; *Adams v. Beale*, 19 Iowa, 61; Blackwell on Tax Titles, 299, 300.)

DANIELS, J.:

The applicant owned real estate upon Walker street, in the city of New York, which, on the 9th of March, 1874, was sold for the non-payment of the taxes imposed upon it by the board of supervisors of the county for the years 1869 and 1870.

The property was purchased at the sale made, by William H. Ely. He advanced to the authorities the amount due for the taxes, with interest upon it to the time of the sale; and the measures provided by chapter 381 of the Laws of 1871 were taken for the purpose of

completing and perfecting his title to the property ; but before the time had expired for a redemption from the sale by the owner she offered to pay the taxes to the comptroller, with seven per cent interest.

That was much less than the amount required to redeem the property from the sale by the terms of the act referred to, and no claim has been made that its provisions upon this subject have been complied with. That act directed that sales should be made after a certain period had elapsed after the imposition of taxes upon real estate, and it prescribed the notices and the mode of proceeding which should be followed to render them effectual.

It also provided the manner in which the owner might redeem, or in case no redemption should be made, the proceeding by which the title of the purchaser would become absolute. By virtue of those provisions the money paid for the purpose of redeeming the property sold was required to be paid and received for the benefit of the purchaser. The authority of the clerk of arrears was substantially an agency to receive the amount mentioned in the certificate of sale, with fourteen per cent interest for the benefit of the purchaser. (Laws of 1871, vol. 1, p. 744, chap. 381.) As to the city and county, the taxes were paid by the advance made by the purchaser under the terms of the sale.

There was from that time nothing further due to any person other than the purchaser, and if redemption were made, the money used to make it became his property. The payment was designed to operate upon his title and to extinguish his interest under the sale. The business was wholly between him and the owner, through the intervention of the clerk of arrears.

But without offering to comply with what had been prescribed for this purpose by the act of 1871, the owner of the property applied directly to the comptroller to receive the amount of the taxes, with seven per cent interest, under chapter 274 of the Laws of 1876. That provided that any person might, within one year after its enactment, pay any taxes previously laid and imposed, and then remaining unpaid, with seven per cent interest, and that the comptroller should make and deliver a receipt therefor, and cancel the record of the tax.

That payment was to satisfy the tax, the interest upon it, and any

penalty which might otherwise have been claimed by reason of default in making it. (Laws of 1876, chap. 274.)

The comptroller declined to receive the money, and the writ of mandamus was applied for to compel him to do so, and to discharge the taxes; and it was denied, because the case made was not within the provision contained in the statute.

This act was only intended to apply to cases where the tax remained unpaid to the public authorities.

It did not provide for a redemption of the property after a sale for non-payment had been made. A different proceeding had been prescribed for that purpose, and no design was in any form evinced to repeal or supersede the provisions which had been previously made upon that subject. Both statutes may very well and very consistently be maintained together; and where that proves to be the case, a preceding act is not repealed by implication by force of another afterwards enacted.

The act of 1876 was in no sense an act for the redemption of property sold for the non-payment of taxes, but it was simply an act to allow payment to be made where nothing had transpired preventing that from being done, upon terms which were more favorable than had otherwise been prescribed; and it was applicable only to cases in which no sale had been made. There the business remained between the owner and the public. The rights or interests of no purchaser intervened, and none were accordingly considered or provided for by the terms of the act. It related to payments which could properly be received by the comptroller, and the omission to provide that the money should be received or held for the use of a purchaser, is cogent evidence that payment before a sale was alone contemplated by the act.

If that had not been the intent, provision would have been made for defraying expenses incurred in advertising and selling the property, and for the extinguishment of the rights of the purchaser. By the terms of the act under which the sale took place he became entitled to fourteen per cent interest on the money advanced by him, in case his title should be defeated by a redemption. That rate of interest had accrued in this instance since the 9th of March, 1874, and for more than two years before the applicant offered to pay the taxes under the act of 1876.

This act evinced no intention to deprive the purchaser of that interest, and no provision was made by it or by any other act for its payment, in any other way than by the owners' redemption of the property sold. It could not have been the purpose to deprive the purchaser of the rate of interest he became entitled to as one of the authorized regulations of the sale. That would not have been attempted without some expression of the design. And yet the act of 1876 had declared nothing whatever upon the subject. It merely provided for a payment, and not for a redemption, and must have been intended to be applicable only to cases in which payment only would be proper, and all that might be necessary to extinguish the tax. All that by the terms of the act could be effected by the payment allowed, was the extinguishment of the lien and the discharge and satisfaction of the tax.

No extinguishment of the rights of the purchaser was provided for, as a consequence to be secured by payment. But if a case involving such rights had been intended to be provided for, they certainly would not have been wholly neglected, as they have been by the terms of this act. If the act can be properly construed to include cases of sales upon which the taxes have already been received, then there would seem to be the same reason for extending it to those in which the time for redemption had been lost by lapse of time.

The power which could, by such an enactment, deprive the purchaser of his interest, would seem to be equally as potent over his title. The terms of the act could as well be held to include the one as the other. But such an act would not be a constitutional exercise of legislative authority, because of its interference with vested individual rights. No such difficulty would be found in the way, however, as long as the demand still remained in the hands of the public authorities.

There it would be a proper subject of legislation without possible injury to any one. And that, it is to be presumed, was what was intended to be affected by the act of 1876. It was to allow payment to be made, where nothing beyond that was needed, to relieve the property of the party paying. And, accordingly, it made provision for payment, but none whatever for redemption. It was claimed that the proceedings which had been taken were not regu-

lar, and for that reason the writ ought to have been issued. But this act has not provided for the trial of that allegation in this way. It has provided for the right and effect of payment alone, when that can be properly made. Beyond that the provision made by it has not been extended. What it secured was the privilege of paying an unsatisfied tax. That did not exist in this case, so far as the city or county was concerned. For to that extent the money had previously been received from the purchaser at the sale, and he and not the city was entitled to whatever should be received to defeat his interest.

If the taxes had not been lawfully laid, and were not legalized by the act under which the sale was made, then they formed no charge upon the applicant's property. But if they were properly laid, or were rendered regular by that act, then, as the sale itself was advertised and made as the act of 1871 required it to be done, the applicant could not relieve her property from the effect of the sale, by merely proposing to pay according to the provisions of the act of 1876.

If the proceedings were void for want of conformity to the law, then the writ was not necessary for the vindication of the applicant's rights. But if they were valid, that of itself was a good reason for denying the application. In neither view was the case a proper one for interference by means of the writ of mandamus. The order should, therefore, be affirmed, with the usual costs and disbursements.

BRADY, J., concurred. DAVIS, P. J., not sitting.

Order affirmed, with ten dollars costs and disbursements.



MARY E. NOYES AND JAMES LOVERIDGE, EXECUTORS OF  
THE LAST WILL AND TESTAMENT OF ELIZA HEARSEY,  
DECEASED, APPELLANTS, v. THE CHILDREN'S AID  
SOCIETY OF THE CITY OF NEW YORK AND OTHERS,  
RESPONDENTS.

*Surrogate of New York — power of, to allow costs and allowances — 2 R. S., 223, § 10 —  
§ 9 of chap. 359 of 1870.*

Under the provisions of 2 Revised Statutes, 223, section 10, providing that "the surrogate may award costs to the party in his judgment entitled thereto, to be paid either by the other party personally or out of the estate," the surrogate is authorized to award costs to the successful party only, and he has no power to award costs to the defeated contestants.

Section 9 of chapter 359 of 1870, providing that "the surrogate of said county (New York) may grant allowances *in lieu of costs* to counsel in any proceedings before him, in the same manner as are now prescribed by the Code of Procedure," restricts his power to make allowances, to those cases in which he is authorized to award costs under the provisions of the Revised Statutes, and he has, therefore, no power under the said act to make allowances to the unsuccessful parties in cases contested before him.

APPEAL from an order of the surrogate of the county of New York, granting allowances to the counsel for respondents.

The appellants petitioned for the probate of the last will of Eliza Hearsey, dated July 11, 1874. The respondents, legatees under a former will, filed objections thereto.

The trial was commenced on March 5, 1875, and a large amount of testimony was taken.

The surrogate entered his decree, admitting the said will of 1874 to probate on December 30, 1875. Counsel for the respondents, against whom the decision had been rendered, applied for allowances on December 30, 1875, the same day on which the decree was entered. On the following day an order was made granting to C. Minor and D. R. Jaques, proctors for the respondent the Children's Aid Society, an allowance of \$2,500 and \$764.65 disbursements, and to S. P. Nash, Esq., counsel for St. Luke's Home, \$750. From the above-mentioned parts of this order Mary E. Noyes, the principal legatee in the will admitted to probate, and James Loveridge, executor thereof, appealed.

*R. W. DeForest*, for the appellants. The order in question is appealable. (R. S., part 3, chap. 9, title 3, § 104.) Such an order, though discretionary, affects a substantial right, and is appealable. (*The People v. N. Y. C. R. R. Co.*, 29 N. Y., 418.) Previous to the Revised Statutes surrogates had no authority to award costs in any case. (*Devin v. Patchin*, 26 N. Y., 441 [1863]); *Lee v. Lee*, 16 Abb. Pr., 129; *Shultz v. Pulver*, 3 Paige, 182; *Reid v. Vanderheyden*, 5 Cow., 719.) By the provisions of the Revised Statutes (2 R. S., 223, § 10, 3d ed.; 5th ed., vol. 3, 367, § 25) the costs were fixed at the same rates allowed for similar services in the Court of Common Pleas, in the year 1837. (3 R. S. [5th ed.], 367, § 23; Laws of 1837, chap. 490, § 70; *Devin v. Patchin*, 26 N. Y., 441; *Wilcox v. Smith*, 26 Barb., 316; *Western v. Romaine*, 1 Brad., 37; *In re Christy's Will*, 1 Tucker, 22 [1865]; *Sherman v. Young*, 6 How. Pr., 318; *Burtis v. Dodge*, 1 Barb. Ch., 77; *Halsey v. Van Ameringe*, 6 Paige, 12.) The surrogate has no authority to make an arbitrary allowance to counsel in lieu of such costs. (*Devin v. Patchin*, 26 N. Y., 441; *Reed v. Reed*, 52 id., 651; *Burtis v. Dodge*, 1 Barb. Ch., 91; *Wilcox v. Smith*, 26 id., 316; 1 Brad., 37; 6 Paige, 12.) The authority to award costs given to the surrogate by the Revised Statutes only permits him to award costs to the successful party. He has no authority to award costs out of the estate to both of the contesting parties. (3 R. S. [5th ed.], 367, § 25, *supra*; *Lee v. Lee*, 16 Abb. Pr., 129, Gen. Term, 1st dist., 1863.) The Code confers no authority to award costs or allowances on surrogates or surrogates' courts. (*Devin v. Patchin*, 26 N. Y., 441.) The law of 1870 limits the authority of the surrogate to "grant allowances to counsel" to the same manner as prescribed by the Code. It does not authorize any allowance to counsel of the unsuccessful litigant.

*D. R. Jaques* and *H. L. Clinton*, for the respondents.

DAVIS, P. J.:

The respondents were unsuccessful contestants of the will of Eliza Hearsey, of which the appellants were proponents. They claimed under a prior will of the testatrix, in which they were made the residuary legatees. After making a decree admitting

to probate the will propounded by the appellants, which revoked the former will, the surrogate made an order under section 9 of chapter 359 of the Laws of 1870, granting an allowance and disbursements to the counsel of the prevailing party, and granting an allowance and disbursements to the counsel of the Children's Aid Society, and an allowance to the counsel of St. Luke's Home, which corporations were the defeated contestants. The principal question upon the appeal is, whether the surrogate had power to grant allowances in this case to the counsel of the contestants. Previous to the Revised Statutes surrogates had no power to award costs in any case. (*Shultz v. Pulver*, 3 Paige, 182; S. C., 11 Wend., 363; *Reid v. Vanderheyden*, 5 Cow., 719; *Devin v. Patchin*, 26 N. Y., 441, 449.)

The Revised Statutes provided as follows: The surrogate may award costs to the party in his judgment entitled thereto, to be paid either by the other party personally, or out of the estate which shall be the subject of the controversy. (2 R. S., 223, § 10; 3 R. S. [5th ed.], 367, § 25.)

This provision was not affected by the Code. (*Devin v. Patchin*, 26 N. Y., 441.) So that prior to the act of 1870, only taxable costs could be awarded. And the surrogate had no power to make any allowances, either to a party as additional costs or the counsel as counsel fees. (*Reed v. Reed*, 52 N. Y., 651; *Burtis v. Dodge*, 1 Barb. Ch., 91; *Devin v. Patchin*, *ubi sup.*; *Lee v. Lee*, 39 Barb., 172; *Western v. Romaine*, 1 Brad., 37; *Wilcox v. Smith*, 26 Barb., 316.)

In *Lee v. Lee* (39 Barb., 172; S. C., 16 Abb. Pr., 129) it was held by the General Term of the first district that the Revised Statutes only permitted the surrogate to award costs to the successful party or parties, and that he could not give costs out of the estate to defeated contestants. And this construction accords with the language of the statute which empowers him "to award costs to *the party* in his judgment entitled thereto" — not to both or all parties — "to be paid by *the other party* personally, or out of the estate which shall be the subject of the controversy."

This statute conferred power to adjudge of three things: first, whether costs should be awarded; second, the party entitled thereto by reason of success in the controversy; and third, whether they

should be charged *personally* on the other party, or be paid out of the subject in controversy. This was the condition of the law when the enactment of 1870 was made. That act declared that "the surrogate of said county" (New York) "may grant allowances, *in lieu of costs*, to counsel in any proceeding before him, in the same manner as are now prescribed by the Code of Procedure." (§ 9, chap. 359, Laws of 1870, p. 828.) This section has in practice been construed in the broadest and most sweeping sense, and such construction has literally reversed what was said in one of the opinions of the Court of Appeals (*Devin v. Patchin*, 26 N. Y., 449), to wit: that "*surrogates cannot lawfully act as almoners of the estates of deceased persons.*" The construction of this section seems never to have been presented to an appellate tribunal, but the reason of this fact (if it be one) may perhaps be found in another portion of the opinion just quoted from.

We think a key to the true construction may be found in the plain letter of the act. The power given to the surrogate is to "grant allowances *in lieu of costs.*" He may still award costs, if he decide to do so, or *in lieu of them* he may grant allowances. This language very clearly restricts the allowances he may make to the cases in which he may award costs, because he is only empowered to put the allowance in the place of costs.

Hence, in cases where he cannot, in his discretion, give costs, he cannot, in his discretion, grant an allowance. We have already seen that he can only award costs to a successful party, and that his discretion beyond that lies in determining whether he will charge the other party *personally* with the costs, or direct their payment out of the fund. The power conferred by the section is, therefore, no broader in its operation than that given by the Revised Statutes in respect of costs, and is simply an authority to substitute allowances, *in lieu of costs*, in cases where the surrogate can lawfully award costs.

Nor do we think the force of this construction is at all diminished by the fact that the word "allowances," is in the plural. It is obvious that there may be in such litigations several successful persons to whom costs may be awarded, and the form of expression more properly refers to those cases, than to everybody who may happen to be on either side in such a controversy, whether losing or winning. Nor does the reference to the Code seem to us to enlarge the

power of the surrogate. He "may grant allowances in lieu of costs to counsel *in the same manner* as are now prescribed by the Code of Procedure in civil actions."

This is merely saying that his mode of proceeding in granting the allowance shall be restricted by the provisions of the Code in respect to the character of the case, as to its being difficult and extraordinary, or one in which a trial has been had, and in respect to "the subject-matter involved" or "the amount of the recovery or claim," and the limitation imposed thereby upon the extent of the allowance. These things are regulated by section 309 of the Code. That section provides for allowances in addition to costs. The section relating to Surrogates' Courts provides only for allowances in *lieu of costs*; but it is apparent that under either of them no allowance is to be given, unless the case and the party be one to whom *costs* are, or may be awarded. That part of section 309 which provides for actions or proceedings for the partition of real estate, may be eliminated in considering this question. The residue of the section will then read thus: "In difficult and extraordinary cases, where a defense has been interposed, or in such cases where a trial has been had \* \* \*." The court may also, in its discretion, make a *further allowance* to any party, not exceeding five per cent upon the amount of the recovery or claim, or subject-matter involved." The party to whom this further allowance may be made must be a successful one, at least in respect of costs, or the allowance will not be *further*. To ascertain the significance of the word "*further*" we must look at the several preceding sections of the Code, from which we find that costs are allowed only to "the prevailing party," who is to be ascertained as prescribed by such sections, and it is to him, when so ascertained, that the further allowance can be made. And so, if we import the words "to any party" into the surrogate's section in place of the words "to counsel," we gain nothing, because in either case the allowance must be either a "*further*" one, which is in addition to costs given, or one "in lieu of costs," which implies that costs can be, or may have been given. We think, therefore, that the surrogate has no power under the act of 1870, to make allowances to parties who do not "prevail" in cases contested before him.

He may excuse such parties, if the case be in his judgment a

proper one, from the payment of costs personally, but he cannot take the subject-matter of the contest which he adjudges to belong to the successful party, and distribute it, or any part of it, among his defeated antagonists. A construction which permits that to be done is hostile to the spirit of our laws, which, in cases of established testacy, requires estates to be divided according to the will of the testator, and in cases of intestacy, according to the statute of distributions.

It is also against public policy, for it virtually offers a premium to reckless contestants and their counsel, to prevent the settlement of estates, by promoting litigation and engendering strife, when every interest of the public calls for their speedy adjustment. The intention of the statute was to enable the surrogate, by making reasonable allowances, to compensate executors and administrators, or other prevailing parties, for expenses which might exceed the items and taxable costs; and not to allow him, *ad libitum*, to reward the unsuccessful clamor of defeated litigants. The other construction might lead to great abuses, to the injury of the widows and orphans, and the creditors of deceased persons, whom all courts should be sedulous to protect. It would be a hazardous experiment for a wealthy man to attempt to dispose of his estate by his own will, if it could be distributed at the mere will of the surrogate, amongst the counsel of all who choose to set up whatever pretexts of contests the ingenuity of avarice can devise. We do not mean by these suggestions to indicate that the will in this case was improperly contested; but on the contrary, we think the contestants had probable cause to resist the probate of the will propounded, and that their contest was in all respects fairly conducted, and for that reason we have excused them from costs on these appeals. But we fail to see any reason in law or justice for awarding them out of the estate several thousand dollars, *pro falso clamore*.

Without considering the several other questions presented by the appeal, some of which are fatal to a large portion of the allowance, we think it our duty to reverse the parts of the order appealed from, but without costs.

BRADY and DANIELS, J. J., concurred.

Order reversed, without costs.

EDWARD CAYLUS AND JOHN DE RUYTER, SURVIVORS,  
ETC., APPELLANTS, v. THE NEW YORK, KINGSTON AND  
SYRACUSE RAILROAD COMPANY, IMPLEADED WITH  
GEORGE H. SHARPE AND OTHERS, RESPONDENTS.

*Issue of bonds by railroad company — statements in — Bona fide purchaser — what  
facts sufficient to put upon inquiry.*

A railroad company issued certain bonds designated as "consolidated first mortgage gold bonds," the bonds referring to a mortgage from which it appeared that it was intended to substitute a portion of the bonds for first mortgage bonds already issued upon the road, and to devote the remainder thereof to the extension and completion thereof. *Held,*

- (1) That the use of the word "consolidated" was sufficient to put a purchaser upon his inquiry.
- (2) That as the bonds referred to the mortgage, a purchaser was bound by the statement contained in the mortgage, and that it was his duty to ascertain whether or not the holders of the old bonds were willing to make the exchange.

APPEAL from a judgment entered upon a demurrer, in favor of the defendants.

This action was brought by certain bondholders of the New York, Kingston and Syracuse Railroad Company against that corporation, its president and directors, and the Farmers' Loan and Trust Company.

The complaint alleged, among other things, that the corporation defendant, having a mortgage for \$2,000,000 on its road and the bonds to which it was collateral issued to various parties, obtained leave from the legislature to extend its road, and entered into a contract for the performance of that work; that plaintiffs furnished certain materials to the contractor for use in such work; that in payment they agreed to receive certain notes, and, as collateral security for their payment, first mortgage bonds of the corporation defendant; that said corporation executed a mortgage on the same property covered by the first-mentioned mortgage and some other property of little value, for \$4,000,000, collateral to bonds described on their face as first mortgage consolidated bonds of the New York, Kingston and Syracuse Railroad Company, and indorsed: "New York, Kingston and Syracuse Railroad Company; \$1,000; No. —;

Consolidated First Mortgage Bonds ;" that plaintiffs relied upon the statement that they were, in fact, first mortgage bonds, and a first lien on the property covered by the mortgage, and received the bonds as collateral to the notes ; that the bonds of the mortgage firstly above mentioned were still outstanding and unpaid ; that the defendants have received the benefit of plaintiffs' materials ; that the notes to which the bonds given to plaintiffs were collateral were only two of them paid ; that plaintiffs have recovered judgment on the others, and execution thereon has been returned unsatisfied.

*E. Ellery Anderson*, for the appellant.

*Stephen W. Fullerton*, for the respondent.

BRADY, J.:

The bonds which were delivered to the plaintiffs by the contractors, the Litchfields, were designated "consolidated first mortgage gold bonds," and the mortgage referred to necessarily became a part of them in determining exactly what they were represented to be. The mortgage, on inspection, would have disclosed the fact that the design was to substitute them for bonds previously issued and secured by mortgage, and would have dictated the propriety, as a matter of security, of ascertaining whether the holders of the old bonds were willing to make the exchange or accept the substitute. The bonds would not all become first mortgage bonds without that change, but there is no allegation thereto, and no fact to warrant the conclusion that the defendants, the directors, knew that the substitution would not be accomplished or that they increased the issue of bonds unlawfully, or for a fraudulent purpose or object.

It was intended, on the contrary, out of the proceeds to extend the route and thus increase its value. The Litchfields, who, it must be assumed, knew the precise character of the bonds, believed, it may be inferred, in their ultimate value to be established by the extra roadway, which they undertook to build, and the consequent advantages to the company and to the bondholders.

It may be inferred, also, that the directors not only believed in the success of the scheme which necessarily included the substitution of the last for the first bonds, but in their value arising from



the additional advantages to be created by the additional roadway; and these are the fair and legitimate inferences from the facts stated.

The element of fraud does not, therefore, spring out of the plaintiff's case, excepting, perhaps, what might be evolved from the statement that the bonds were first mortgage bonds; but this representation was coupled with, and controlled by, the word "consolidated," and was sufficient to put the purchaser upon his guard or inquiry.

The transactions in this class of securities are generally hurried and rarely conducted with proper precautions. It is questionable whether, as a rule, the investors who seek bonds subject them to the scrutiny which careful persons apply to the ordinary enterprises of life, and they doubtless suffer even when they occupy the position of *bona fide* purchasers for value. The plaintiffs do not, however, occupy this relation to the defendants, the directors, because the bonds were accepted as security for, and not in payment of, the bill of merchandise for which the Litchfields contracted. The case presented seems, therefore, to be bald in several respects, namely: the absence of fraudulent design or purpose in issuing the bonds; the absence of any charge connecting the defendants, the directors, with the delivery of them to the plaintiffs; the absence of allegation or charge showing the plaintiffs to be *bona fide* holders for value, and the absence of any representation by the defendants, the directors, aside from the bonds themselves, and which explained their design and purpose sufficiently to notify the purchaser or person taking them of their character, or that he should examine.

The whole case seems to be more consistent with innocence than with fraud, within the rule laid down by the cases relating to the subject, and it is therefore incomplete. (*Marsh v. Falker*, 40 N. Y., 562; *Wakeman v. Dalley*, 44 Barb., 498; *Meyer v. Amidon*, 45 id., 169, 171; *Oberlander v. Spiess*, 45 id., 175.) The case of *Wakeman v. Dalley* is particularly illustrative in this action.

It is not intended by the result of this review to justify the proceeding complained of. If the officials of a corporation were held to a strict accountability; if, in other words, the securities emanating from them were held to import verity, and they to responsibility, if it were otherwise in fact; then first mortgage bonds would

mean first mortgage bonds, and would not be issued until all the preliminaries to make them such had been observed and performed. These views, in addition to those expressed at Special Term, render it necessary to affirm the judgment, with costs.

DAVIS P. J., and DANIELS, J., concurred.

Judgment affirmed, with costs.

# MEMORANDA

OF

## CASES NOT REPORTED IN FULL.

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GEORGE BUESS, RESPONDENT, v. GEORGE KOCH, APPELLANT.

*Demurrer — Contract of sale — specific performance — when ordered, notwithstanding failure of plaintiff to tender deed — Prayer for judgment — sufficient, when appropriate to, though not covering all required in a proper judgment.*

APPEAL from an order overruling a demurrer to the complaint of the plaintiff.

The complaint set out an agreement made by the parties on the 1st day of March, 1870. It contained a recital that the defendant had entered into an agreement with George Prager, by which he had become bound to purchase certain premises on Rivington street, in the city of New York, for the sum of \$15,000, and at his request, the plaintiff had consented to take his place and perform his covenants with Prager; and had further agreed to alter the building upon the land into a shop suitable for carrying on the cabinet making business, and lease the premises to the defendant for five years from the first day of the following month of May, and then to convey them to him. The premises were then, by the terms of the agreement, leased and demised to the defendant for such term of five years, at the yearly rent, payable quarterly, of ten per cent on their cost, and the expenses of their alteration.

It was then covenanted that, on or before the expiration of the term of five years, the defendant would well and truly pay to the plaintiff "the said consideration of \$15,000, and also the cost and expense of altering the building as aforesaid, upon the said Buess executing to him a good and sufficient deed of the said premises, free from all incumbrances, which deed shall contain a general warranty and the usual full covenants." The plaintiff averred that he altered the building and rendered it suitable for the business to which it was to be adapted; that the defendant occupied it and paid

the rent up to the 1st of May, 1875. It was also averred that before that day he gave the defendant a notice, in writing, requesting information from him as to the time when he would be ready to complete the agreement. To that no reply was made. The plaintiff, after the 1st of May, 1875, executed a deed of the premises to the defendant, and went to his residence to deliver it, and receive the payment agreed to be made, but he failed to find the defendant. Efforts were afterwards made by his attorneys to find the defendant for the same purpose, but they proved to be ineffectual. The plaintiff also averred that, on the 1st of May, 1875, and even since then, he had been ready and willing to execute and deliver the deed, in conformity to the terms of the agreement; that the alteration of the building rendered it unfit for other uses than that of a store, without further changes requiring great expense. The expenses of the alterations made amounted to the sum of \$11,666.04; and for that, with the purchase-price to be paid for the property, according to the terms of the agreement, the plaintiff demanded judgment.

The defendant demurred to the complaint, because it did not contain facts sufficient to constitute a cause of action.

The court at General Term said: "The complaint failed to show a strict performance of the agreement by the plaintiff. But it alleged such a state of facts as directly tended to excuse it, and which entitled him to have the agreement specifically performed. He had so far performed himself as to make the alterations in the building and give the defendant possession. And he endeavored to fulfill the residue of the covenants to be performed by him, by securing an understanding which should designate the time when that might be done. That proved ineffectual by the defendant's failure to respond. And then the deed was executed, and the defendant sought for in order to complete the agreements; but all reasonable efforts to find him proved to be fruitless, and then this action was commenced. If the plaintiff was in default as, strictly, he probably was, at law, because he omitted to have the deed executed on or before the first of May, and tendered on that day at the defendant's residence, it was equitably excused by the other acts performed by him. For that reason a court of equity would not defeat his claim to relief, because he too confidently relied upon the

expectation that the defendant would meet him, and in good faith co-operate with him in performing the covenants which were to be mutually observed, according to the terms of their agreement. His conduct in failing to do so was inequitable, and he ought not to be allowed to shield himself, by means of it, against the just demand made by the plaintiff, that he should take the property on the terms he had stipulated to perform for it. (1 Story's Eq. Jur. [9th ed.], §§ 775, 776; *Stevenson v. Maxwell*, 2 Comst., 409; *More v. Smedburgh*, 8 Paige, 601; *Leaird v. Smith*, 44 N. Y., 619; *Freeson v. Bissell*, 63 id., 168.) It also appeared that the defendant had had the use and occupancy of the property. And as it has not been alleged that he surrendered its possession when his term expired as a tenant, it may be presumed, as he was to have the property afterwards as its owner, that he still continues to hold it; and for that reason, also, he cannot properly complain of the omission to execute and deliver the deed on or before the first day of May. (*Viele v. Troy and Boston R. R. Co.*, 20 N. Y., 184.)

The prayer for judgment is entirely consistent with the character already attributed to the action. It demands the recovery of the purchase-price of the property and the amount of the expenses incurred in altering the building; and that, the facts alleged show the plaintiff equitably entitled to recover. If a specific performance shall be decreed, the plaintiff will be entitled to a judgment for the payment of the money the defendant covenanted he should receive, and nothing more nor less than that has been demanded. The fact that all the relief which may be essential to such an action has not been claimed, does not render the complaint so defective as to make it the subject of a demurrer. To avoid that consequence, it is sufficient that the facts constituting an equitable cause of action have been alleged, and that the relief insisted upon is appropriate to, while it may not be all that will be required for a complete or perfect judgment. (*Hale v. Omaha Nat. Bk.*, 49 N. Y., 626, 631, 632.)"

*M. L. Townsend*, for the appellant. *Kaufman, Trustall & Wagner*, for the respondent.

Opinion by DANIELS, J.; DAVIS, P. J., and BRADY, J., concurred.

Order affirmed with costs, and with liberty to defendant to answer within the usual time, and upon payment of costs, to be adjusted.

NATHANIEL W. HOOKER, RESPONDENT, v. WILLIAM R.  
MARTIN AND OTHERS, APPELLANTS.

*Foreclosure — judgment in action for — taking of portion of mortgaged property by city for public use — effect of — right of plaintiff (mortgagee) to the award.*

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury. These actions were brought in the usual form for foreclosure of two purchase-money mortgages, made by the defendant William R. Martin to the plaintiff, upon land in the city of New York. The appellants (Martin, mortgagor, and Arbona, his grantee) answer, setting up the taking of a part of the property described in the mortgage and in the complaint for public use, by which such portion became vested in the mayor, aldermen and commonalty of the city of New York, and aver that the plaintiff, by reason thereof, cannot maintain his action, and that in any event the city should be made a party to the action. An award was made in plaintiff's name for the land taken, and an assessment laid upon the residue of the land for benefit, in excess of the award. The judgment establishes that plaintiff is entitled to collect the award for the portion of the mortgaged property taken for public use, and orders sale of the remainder for the payment of the amount due plaintiff, after crediting defendants with the amount of the award.

The court at General Term said: "The proceedings of the city in taking a portion of the mortgaged lands for public use did not displace or otherwise affect the lien upon the residue of the mortgaged premises. So much of the land as was taken by the city was discharged of the lien of the mortgage, and it was not necessary to make the city a party because of its subsequently acquired title thereto, for the reason that the city could not be barred or affected by the foreclosure. The court below awarded judgment in favor of plaintiffs in respect to the moneys awarded for damages in taking the lands by the city, and directed foreclosure and sale for the balance only. This was an equitable disposition of the rights of the parties to the action, and it was not necessary to bring in the city as a party for the purpose of making that disposition. The Code only

requires other parties to be brought in, in cases where the rights of the parties already before the court cannot be disposed of without the presence of such absent person or parties. That is not the present case."

*Jas. B. Kissick*, for the appellants. *Townsend Wandell*, for the respondent.

Opinion by DAVIS, P. J.; BRADY and DANIELS, JJ., concurred.

Judgment affirmed.

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MARTHA RUCK, RESPONDENT, v. GUSTAV LANGE,  
APPELLANT.

*Lis pendens* — may be filed in action affecting leasehold interest in lands

APPEAL from an order denying a motion to set aside a notice of the pendency of this action.

The court at General Term said: "This action has been commenced to secure the specific performance of a contract for the sale of a leasehold interest in land having about twenty years to run. To that extent it affected the title of the premises in which the term had been created. The Code has not prescribed the extent to which the title to real estate must be affected to justify the filing of notice of the pendency of the action; but it has provided, in general terms, that the notice may be filed in any action affecting the title to real property. (Code, § 132.) This was such an action, and the motion made to set aside the notice was properly denied.

*Leary & Bischoff*, for the appellant. *J. & R. Davidson*, for the respondent.

Opinion by DANIELS, J.; DAVIS, P. J., and BRADY, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

WILLIAM R. MARTIN, RESPONDENT, v. THE WINDSOR  
HOTEL COMPANY, APPELLANT.

*Action by an attorney for services—defense that charges are exorbitant and oppressive—reference not usually ordered in such cases.*

APPEAL from an order made at the Special Term, directing a referee to hear, try and determine the issues in the action.

This action is brought to recover for services of the plaintiff, as an attorney and counselor, for a period running from September, 1873, to the close of the year 1874.

The court at General Term said: "We think there is no doubt that the court below had power to order the reference, in its discretion. This court is, however, at liberty to review the order, notwithstanding it was discretionary. It is apparent from the affidavits and pleadings that the principal questions on the trial will be, whether the plaintiff performed the services on the retainer of the defendants or of John T. Daly, and the fair value of such services. The issues ought not to be long in the trial, and the account is not complicated nor embarrassing. An expert is not necessary, except upon the question of values, and as to that, the experts are more properly to be the witnesses. There is no fixed rule which prevents the reference of an attorney's account for services to another attorney, and yet courts should be careful to avoid referring such cases to members of the same profession, where there appears upon the face of the claim good reason to suppose that the client's resistance, on the ground of exorbitance and oppression, may prove to be well founded. It is not because such referees will not do equal and full justice to the parties, but because of a general impression that, on questions of compensation for legal services, lawyers may not be, and sometimes are not, unprejudiced in determining values. A physician is not chosen as a referee on physician's accounts, nor are clergymen when a pastor sues for the value of his services, and so, also, as to all other trades and professions; and in the popular mind it is, not without some show of reason, thought invidious that lawyers only should be selected to determine the claims of lawyers. It is better for the profession and for the courts that this should



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FIRST DEPARTMENT, MARCH TERM, 1877.

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not be so ; and the honor and well-being of the profession requires that lawyers should not be thought to shrink from an examination of their charges by a jury, enlightened by the opinions of other lawyers as witnesses, and by the instructions of the courts."

*Luke A. Lockwood*, for the appellant. *James Emott*, for the respondent.

Opinion by DAVIS, P. J. ; DANIELS, J., concurred.

Present — DAVIS, P. J., DANIELS and BRADY, JJ.

Order reversed and motion denied, without costs.

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GABRIEL H. BARBEY AND ANOTHER, PLAINTIFFS, v. BENJAMIN L. LUDINGTON, DEFENDANT.

*Agreement to share money overpaid to United States, if recovered—interest thereon follows principal.*

MOTION on behalf of the plaintiff for a new trial, on exceptions ordered to be first heard at General Term.

The defendant was employed to recover back duties which had been paid by the plaintiffs on the importation of bronze powder and Dutch metal, in excess of what it was claimed could be legally imposed by the United States authorities. The excess was afterward recovered, with interest, and one-half the amount was paid over to the plaintiffs. They claimed, however, the interest upon the half retained by the defendant under the agreement entered into when they employed him. Their claim was rejected and the complaint dismissed at the trial. By the terms of the agreement the plaintiff agreed to allow the defendant "one-half or fifty per cent of all he may recover back or obtain from the government or its officers, of the forty-five per cent duty heretofore exacted or hereafter exacted," etc.

The court at General Term said : "No stipulation in any form was made on the subject of interest, and its recovery was not probably contemplated then by either of the parties. When the interest was recovered it must have been as an incident to the principle, which in legal

contemplation it certainly was. (*Stevens v. Barringer*, 13 Wend., 639.) And as the agreement made in effect gave the defendant one-half the forty-five per cent that should be recovered, by way of principal, his right to an equal portion of the interest would seem to follow logically from that circumstance. In this respect the agreement was expressed in plain terms, that the defendant should have one-half of what might be recovered of the excessive forty-five per cent. That was substantially transferred to him and it became the source of the interest retained by him and now claimed by the plaintiffs. This interest accrued upon that half, and plainly seems to be as much his property, as the agreement had made one-half of the principal. It originated in and accrued upon his half of the amount recovered. It was an incident of it, and attached itself to that half (*Munsell v. Lewis*, 2 Den., 224), and to that half the plaintiffs parted with their title in favor of the defendant. By means of the rights so acquired, the accretions or fruits of the property or share assigned became a portion of it, and consequently belonged to him. The reasonable construction of the terms of the agreement itself leads to the same conclusion. By that he was to have one-half of all he might recover or obtain of the forty-five per cent. This should not be restricted, as the plaintiffs have insisted, to the forty-five per cent as the extent of the subject-matter of the contract. But it should extend to whatever might be recovered on the basis that the forty-five per cent had been illegally exacted. He was to have half of what might be recovered or obtained of the forty-five per cent. That is one-half of what should be recovered for or on account of this unlawful excess paid by the plaintiffs."

*James Clark*, for the plaintiffs. *George W. Lord*, for the defendant.

Opinion by DANIELS, J.; DAVIS, P. J., and BRADY, J., concurred.

Motion denied with costs, and judgment ordered for defendant.

IN THE MATTER OF THE PETITION OF JOHN FOSTER TO VACATE  
AN ASSESSMENT, ETC.

*Charter of New York—chap. 574 of 1871—designation of official paper under—when complete.*

APPEAL from an order vacating an assessment for paving Twentieth street, between Third avenue and the East river.

The court at General Term said: "The assessment was made for the expenses of paving Twentieth street, between Third avenue and the East river. The ordinance directing the improvement was adopted by the board of aldermen on the 3d of June, 1872, and it was approved by the mayor the next day. The evidence showed that the mayor and comptroller, on the 3d day of June, 1872, designated the Daily Register as the daily paper in which should be published every notice or advertisement, required by law or ordinance to be published in one or more papers in the city and county of New York. This designation was made under the authority of section 1 of chapter 574 of the Laws of 1871. And by the terms of the act it could only become complete when the certificate making it was filed in the office of the comptroller. The certificate was dated on the 3d day of June, 1872, but there was no evidence given showing it to have been at any time filed in the comptroller's office. That was necessary under the terms of this act for the purpose of making the designation and creating the duty to publish the resolution or ordinance, with the yeas and nays, and the names of the persons voting for and against it, before it was sent to the mayor for his approval. (Vol. 1, Laws of 1870, p. 369, chap. 137, § 20.) There was no proof of failure to publish, beyond the evidence that the requisite publication had not been made in the Daily Register, and that was insufficient, because a completed designation of that paper was not shown before the time when the resolution or ordinance was approved by the mayor. And in that case it might very well have been otherwise legally published. (*Peugnet's Case*, 5 Hun, 434.) He should have shown the filing of the certificate in the comptroller's office to render the designation of the Daily Register complete."

*J. A. Beall*, for the appellant (the city). *Allison & Shaw*, for the petitioner, respondent.

Opinion by DANIELS, J. ; DAVIS, P. J., and BRADY, J., concurred.

Order reversed, rehearing ordered, with costs to appellant to abide event.

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IN THE MATTER OF JAMES ALEXANDER STRIKER'S PETITION  
TO HAVE STALE ASSESSMENTS VACATED.

*Assessments — presumption of payment — cancellation of — power of court over — parties to application for.*

APPEAL from an order at Special Term canceling assessments.

The petitioner applied to have certain assessments vacated, canceled and declared null and void. They were confirmed in the years 1836, 1838, 1839 and 1840.

In 1856 his father, who was then the owner of the property upon which they were imposed, obtained an injunction which restrained the city authorities from selling the land to satisfy the assessments, and that injunction still continues. The assessments are, nevertheless, a cloud upon the title, and the petitioner for that reason desires to have them vacated.

It appeared from testimony given before the referee, that they were once marked paid, and that the petitioner's father, who owned the property affected, was careful in the payment of all assessments. It also appeared that the records in regard to such matters in former days were very inaccurate, and that in many instances assessments which had been paid were not so marked ; that the clerks, then in charge of the records, had died, and that in consequence of the frequent removals of the records and changes in the departments and bureau, the original records had disappeared, and that the papers relating to the estate affected, including papers of the petitioner's father, had been lost by changes in the offices of the brother of the petitioner, in whose charge they were. The only answer made to these facts and circumstances was, that by some of the records the assessments were not marked paid, and therefore continued to be liens on the land to which they related, and the question presented by them is, whether they afford a reasonable presumption that the assessments have lost vitality and should not be enforced.

The court at General Term said : " They would seem to be sufficient for that purpose. It does not appear why the assessments should be continued, after they were marked paid, although it may be accounted for by the inaccuracy which at one time prevailed in the department having charge of such matters. It does not appear, either, why the injunction has been allowed to continue for a period of more than twenty years after it was granted, and the omission to explain this by the authorities must be to their prejudice, because the presumption is, that the restraint was based upon facts and circumstances which warranted it, and which have not been overcome or at all affected by any act on their part or behalf.

Indeed it may be presumed that it was granted, because the assessments were shown to have been paid, a fact of which there is some evidence arising from the entry of payment already mentioned.

These facts and circumstances, taken in connection with the long delay which has occurred, justify the conclusion that the assessments should not be allowed to continue as a cloud upon the petitioner's title and should be canceled.

It is objected that this remedy cannot be granted on petition, but the appellant did not object to the investigation made on that ground, and the facts and all the parties are before us.

The assessments are in the nature of judgments. (*Mayor v. Colgate*, 12 N. Y., 140.) They are confirmed by the order of this court, and are subject to its power and authority on a question like that presented for consideration.

The power of this court on motion or petition to order a judgment canceled cannot be questioned, and need not be discussed. The parties to these judgments are the owners of the property, and the city. They are before us and have presented their proofs.

The order made at Special Term was, for these reasons, properly directed and should not be disturbed. It is therefore affirmed, but we think no costs should be allowed."

*Hugh L. Cole*, for the city, appellant. *Elliott F. Shepard*, for the petitioner, respondent.

Opinion by BRADY, J. ; DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, without costs.

## IN THE MATTER OF THE HABEAS CORPUS OF WALTER JENNINGS.

*Court of General Sessions, of New York city — jurisdiction of — presumptions.*

CERTIORARI to review proceedings on *habeas corpus*, in which the writ was dismissed.

The commitment on which the relator was held showed, that at a Court of General Sessions held in and for the city and county of New York, the recorder presiding, it was adjudged, on the confession of the relator, that he was guilty of burglary in the third degree and that he was duly sentenced. It was claimed by the relator that the commitment was insufficient, because the General Sessions is an inferior court, and all the facts necessary to give it jurisdiction of the offense stated should have been set out.

The court at General Term said: "This view is erroneous. The confession of the relator is itself an admission of the jurisdiction of the court. If it were not, the result must be the same, because the Court of General Sessions is one of general criminal jurisdiction, having the power to hear, determine and punish according to law all crimes and misdemeanors whatsoever, including crimes punishable with death or imprisonment in the State prison for life. (3 R. S. [5th ed.], §10.) The crime of burglary in the third degree is one of which that court can take jurisdiction if committed within the county, and all presumptions are in favor of the jurisdiction exercised therefore, and of the validity of the judgment pronounced in reference to it. This presumption arises from its general criminal powers. (*The People ex rel. Tweed v. Liscomb*, 60 N. Y., 559.) The traverse did not present an issue on the subject, and the presumption was not rebutted."

*William F. Howe*, for the relator. *B. K. Phelps*, for the respondent.

Opinion by BRADY, J.; DAVIS, P. J., and DANIELS, J., concurred in the result.

Proceedings affirmed and *certiorari* dismissed.

# Cases

DETERMINED IN THE

## FOURTH DEPARTMENT

AT

GENERAL TERM,

April, 1877.

LYDIA A. SHAKESPEARE, APPELLANT, v. WILLIAM G. MARKHAM, EXECUTOR, ETC., AND OTHERS, RESPONDENTS.

*Surrogate—jurisdiction of, over claim presented by executor—Agreement to leave property by will—must be certain and definite—service rendered in expectation of—remedy of party rendering the services.*

A surrogate has no jurisdiction or authority to pass upon the validity of a claim against an estate presented by an executor in his own behalf, where the same is contested, nor can a reference be ordered in such a case to determine the same, though all the parties consent thereto.

Where one person renders services to another in the expectation of receiving a legacy from him, relying solely upon the testator's generosity, there being no contract, either express or implied, that compensation shall be made therefor by will, and the party for whom the services are rendered dies without making such provision, no action will lie in favor of the person rendering the same.

Where, however, a certain and definite contract to leave property by will is clearly established, and the promisee has fully performed the contract on his part, a court of equity will, in a case free from all objection, either on account of inadequacy of consideration or of other circumstances rendering the claim inequitable, compel a specific performance thereof.

Specific performance of such a contract refused in this case, for the reason that the terms and provisions thereof were not sufficiently certain and definite.

Where the contract is too indefinite and uncertain to authorize a decree of specific performance, the remedy of the party who has rendered the services is to bring an action before some tribunal competent to pass upon a disputed claim, to recover the actual value of the services rendered, as upon a *quantum meruit*.

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10h 311  
164ad595

10h 311  
71 AD 220  
37 MIs 608

10h 311  
77 AD 25  
77 AD 26  
77 AD 462

The measure of damages in a case in which the claimant seeks to recover on an agreement to support and maintain the testator during the term of his natural life, is the amount which the board of the testator, and his nursing during his last illness were reasonably worth, less the value of any services rendered by him.

The expenses incurred by an executor in an unsuccessful attempt to enforce before the surrogate, a claim made by him against the estate, including the fees of an auditor and his own counsel fees therein, should not be allowed to him out of the estate.

APPEAL from a decree of the surrogate of Monroe county, rendered upon the final accounting of William G. Markham, as executor of the last will and testament of Wayne Markham, deceased.

*J. L. Hawes*, for the appellant. The Surrogate's Court had no power to adjudicate upon the joint claim against the estate made by the executor and his three sisters. (Dayton, Surr., 394, 549, 551, 552, 553; id., 507-509 [3d ed.]; *Merchant v. Merchant*, 2 Bradf., 432, 447; 3 R. S. [5th ed.], 175, §§ 37, 38; *Tucker v. Tucker*, 4 Keyes, 136, 147; *Estate of John Shaw*, 1 Tuck., 352.) This being a disputed claim and not having been determined by any authorized tribunal, could not be determined on final accounting of the executor. (*Tucker v. Tucker*, 4 Keyes, 136; Redf., Surr., 391, 395; *Wilson v. Baptist Edn. Soc.*, 10 Barb., 309, 316; *Curtis v. Stilwell*, 32 id., 354; *Magee v. Vedder*, 6 id., 352.) A promise to pay deceased relatives for services will not be implied, and unless one is clearly proved they will be attributed to affection and generous kindness, or benefit received. (*Margaret Keller's Estate*, 1 Tuck., 28; *Osburne v. Osburne*, 1 Bradf., 356; *Bowen v. Bowen*, 2 id., 336; *Robinson v. Cushman*, 2 Den., 149; *Williams v. Hutchinson*, 3 N. Y., 312; *Delmott v. Taylor*, 5 N. Y. Sur. R., 417; *Weir v. Weir's Admrs.*, 3 B. Mon., 645.) Claims for service rendered in consideration of a promised legacy can only be sustained by positive and convincing proof. (2 Redf. on Wills, 281, 282; *Graham v. Graham*, 34 Penn. St., 475; *Thompson v. Stevens*, 71 id., 161; *Neal v. Gilmore*, 79 id., 428.) This contract, if it could be considered one, was utterly void for uncertainty and indefiniteness. There was no definite legacy proposed. No specified property or fixed amount to be left. (17 S. & R., 45.) The measure of recovery in all such cases is the



value of the services. (*Lisk v. Sherman*, 25 Barb., 433; *Quackenbush v. Ehle*, 5 id., 469; *Erben v. Lorillard*, 19 N. Y., 299; *Robinson v. Raynor*, 28 id., 494; *Ham v. Goodrich*, 37 N. H., 185, 190; *Graham v. Graham*, 34 Penn. St., 475; *Hertzog v. Hertzog*, 34 id., 418; *Sherman v. Kitzmiller*, 17 S. & R., 45; *Swedens v. Wild*, 7 How. Pr., 309; *Calkins v. Falk*, 39 Barb., 620; *Jacobson v. Executor*, 3 J. R., 199; *Patterson v. Patterson*, 13 J. R., 379; *Wright v. Martin*, 13 Wend., 460; 71 Penn., 161.) Any other rule of damages would violate the statute of wills and validate a verbal will, or, in this case, a verbal revocation of a will. (3 R. S. [5 ed.], 138, 141; *Graham v. Graham*, 34 Penn. St., 482.) A portion of his property, at the time of the claimed arrangement, was real estate; it was therefore void by the statute of frauds. (Brown on Frauds, §§ 65, 66; Roberts on Frauds, 272.) If this was a contract it was entire, embracing realty and personalty, and therefor as well as for its uncertainty, utterly void, and could not be the foundation of an action or even resorted to for a measure of compensation. (*King v. Brown*, 2 Hill, 485; *Van Alstine v. Wemple*, 5 Cow., 162, *Erben v. Lorillard*, 19 N. Y., 299, 433; *Lisk v. Sherman*, 25 Barb., 433; 11 Casey, 23-28.) The executor should not have been and should not now be allowed the item for counsel. (26 Barb., 316; 25 How., 5; 26 N. Y., 441; 39 Barb., 172.)

*A. M. Bingham*, for the respondents. The validity of the agreement upon which this claim is based is settled by the following cases: *Dresser v. Dresser* (35 Barb., 573); *Thompson v. Stevens* (21 Penn., 161); *Lees v. Hale* (10 Wend., 426). The fourth objection is to the allowance of \$260 counsel fee. There is no error in the allowance of this item that appears in the case. If the appellant claims that such fees were not properly allowed to the executor, he should point to some irregularity in such allowance so that the facts relating to the same might appear by the return of the Surrogate's Court. (*Bainbridge v. McCullough*, 1 Hun, 488.) The rule seems to be fully settled that where a contract is sufficiently certain to form a basis for calculation, so that it can be made definite by extrinsic evidence, it will be enforced. (*Gilman v. Gilman*, 2 Lans., 1; *Richards v. Edick*, 17 Barb., 260; *Thompson v. Stevens*, 71 Penn., 161; *Fish v. Hubbard*, 21 Wend., 651.)

TALCOTT, J.:

This is an appeal from the decree of the surrogate of Monroe county, finally settling and adjusting the account of William G. Markham, as executor of the estate of Wayne Markham, deceased. The plaintiff is the granddaughter of the deceased, and sole legatee for life of the whole estate of the deceased, with remainder to the heirs of her body, share and share alike. She and her children are the sole lineal descendants of the testator, who died at the town of Rush, in Monroe county, in August, 1872, at the age of seventy years and upwards. The respondent William G. Markham, of the town of Rush, a nephew of the deceased and a son of Guy Markham, of Rush, is one of the executors named in the will of the testator, and caused it to be proved before the surrogate of Monroe county, and took upon himself the sole trust and duty of the execution of the will, the other persons named therein as executors being residents of the State of Michigan. The proceeding for a final accounting was at the instance of the said executor. His account presented for settlement, as his final account, credits the estate of the testator with the sum of \$6,002 in the bank of Avon at the time of the decease of the testator, fifty-two dollars in cash in the possession of the testator, and other amounts realized by the executor from the sale of small amounts of personal property, the whole estate amounting to \$6,199.75. The said account credits the executor for funeral expenses paid, and for the expenses of administration, including twenty-nine dollars for counsel fees, the whole amounting to \$636.79. The executor then makes a charge, as follows:

"To amount claimed by the executor jointly with Mary Markham, Emma Puffer and Isabella Dunsford, under a contract with testator for his maintenance during his natural life, \$5,542.06," being the precise balance of the estate which had come to the hands of the executor.

The appellant having been cited appeared before the surrogate, and interposed objections in writing to the allowance of said account, in substance as follows:

First. That the executor has not credited the estate or charged himself with interest on the cash in the bank of Avon, although he has had the use of and interest upon the said sum of money in said bank of Avon and elsewhere.

Secondly. That the item of \$5,542.96 charged against the estate, as claimed by the executor jointly with others, is erroneous, and should not be allowed by the surrogate, for the following reasons :

First. That the said claim as charged in said account is wholly false and fictitious, and is not a legal charge against said estate or said executor, nor is said estate or said executor liable for the payment of the same or any part thereof.

Second. That said executor has not paid said amount or any part thereof to any person.

Third. That no voucher evidencing such payment is produced.

Fourth. That no claim for the payment of said amount of \$5,542.96 has been presented by, or on behalf of said executor alone, or with other persons, to the surrogate, supported by affidavit as required by statute in case of claims made by executors against the estate in their hands for settlement.

Fifth. No proper or sufficient proof of said claim has been made before said surrogate.

The objections of the appellant contain three other objections to the said account and the affidavit accompanying the same, and conclude with an objection that the surrogate has no jurisdiction or authority to pass upon or allow the disputed claim of Mary Markham and others, whether considered separately or jointly with the claim of the executor. Upon filing the said objections, the surrogate overruled all the objections to his jurisdiction, and made an order, referring it to an auditor to hear, examine and report on the claim made by the executor jointly with Mary Markham and others. The auditor reported in favor of the allowance of the claim, and the testimony taken before him constitutes a part of the case. From the auditor's report of the testimony it appears that, at the commencement of the proceedings before him, it was agreed by the parties that the said auditor should take the proofs of the said claim and pass upon and determine the same, and report thereon to the surrogate, with his opinion, in pursuance of the order of the surrogate. The auditor made his report sustaining the claim on the 17th of July, 1875. On the 27th day of July, 1875, the attorney for said executor filed a paper in the office of the surrogate, containing a statement of the claim, by Emma Puffer, Mary Markham and M. Isabel Dunsford, with their several affidavits that the same

was true in all respects; that no part of the same had been paid and that no offsets exist against said account. The claim was stated as follows: "The estate of Wayne Markham in account with S. Emma Puffer, M. Isabel Dunsford and Mary E. Markham, jointly with William G. Markham, executor: To amount due upon contract for support, \$6,000, our interest being three-quarters of the amount upon equal distribution, to wit: \$4,500." The same paper also contained an acknowledgement, dated January 1, 1874, purporting to have been signed by S. Emma Puffer, Mary E. Markham and M. Isabel Dunsford, that they had received their "several interest in the foregoing claim" from the executor. On the 29th day of July, 1875, a final hearing was had, and a motion was made on behalf of the executor to confirm the report of the auditor, and thereupon the appellant filed written objections to the facts found and the conclusions of law of the auditor upon various special grounds touching the validity of the claim, and also objected that the executor had not complied with the statute providing for the proof of claims in favor of executors against estates in their hands, and renewed substantially the same objections she had previously made to the authority of the surrogate to pass upon the claim and to the form of the verifications. Afterwards, and during the said final hearing, the surrogate allowed the executor to file a new statement of the claim substantially in the same form as stated in his account, with the additional statement that he had paid to the other joint claimants their distributive shares, with the usual affidavit of verification, and that the account actually accrued against Wayne Markham in his lifetime, and that no part thereof had been paid or settled as to him, the executor, nor except as paid by him to the other joint claimants thereof. To the filing of this paper the appellant also objected, and again renewed her objection to the power and authority of the surrogate to pass upon the same. All the objections made by the appellant to the report and opinion of the auditor, and to the power and jurisdiction of the surrogate, to the form and verification of the accounts, and all her objections were overruled, and on the 13th day of December, 1875, the surrogate made a decree in the proceeding, sustaining the report and opinion of the auditor allowing said joint claim, and finally settling the executor's account. The account was finally settled, as rendered by the executor, except that the latter was

charged interest on \$6,000, for six months, and was credited in gross with \$260 counsel fees, and \$60 auditor's fees; it not appearing, however, that any vouchers for said counsel fees, or auditor's fees, were presented, or any specification of the items given. On this case the first question to be determined is, whether the surrogate had any jurisdiction to pass upon the said joint claims, or any authority to allow the same as a part of the executor's account.

The long controversy which has existed on this subject in the courts was, as we understand, finally put at rest by the decision of the Court of Appeals in the case of *Tucker v. Tucker* (4 Keyes, 136). A reference to the various preceding decisions of the various courts on the subject may be found in the elaborate opinion of the surrogate of New York, in *The Matter of the Estate of John Shaw* (1 Tucker, 352.)

In the case of *Tucker v. Tucker* (*supra*; also reported in 4 Abbott's Decisions of the Court of Appeals, 428), it is expressly held, that upon a final or litigated accounting of an executor, the surrogate has no jurisdiction to try the validity and amount of a disputed demand against the estate. That the consent of the parties to go on before the auditor cannot be sustained as an arbitration, is also held in the same case, upon the ground that consent cannot confer jurisdiction of the subject-matter, upon a court professing to act as such, but proceeding without jurisdiction of the subject.

The whole proceeding by and before the surrogate of Monroe county, in this case of a disputed claim against the estate, by which the claim was allowed was *coram non judice*, and void. But, as we are desired to examine the merits of the claim itself, we proceed to do so, in the hope that it may possibly tend to prevent further litigation between the parties.

It appears that the testator had been for some time a resident of Kalamazoo, in the State of Michigan, where he made his will bearing date the 18th day of March, 1871, while he was residing in the family of appellant and her husband. About the month of April, 1871, he wrote to his brother, Guy Markham, of Rush, in the county of Monroe, in this State, that he had had some misunderstanding or difficulty with Shakespeare, the husband of the appellant, and that he was under the necessity of seeking a new home, and that he would like to come and live with the said Guy Markham and his (Guy's)

children, saying he thought he could make himself as useful to Guy and his family as any place he could go to, and would be willing to do so as far as his health would permit; that if he could do so, he would pay them for all trouble and expense, if he had enough to do so with, and that what little property he had would go to the person or persons who befriended him in his old age, stating that he thought he should save of his property over \$6,000, and requesting the said Guy to come out to Kalamazoo so that he could talk and advise with him. Guy Markham, in pursuance of such request, went to Kalamazoo, when the request was repeated, that the testator might come and live with him (Guy). Guy consented to the proposition for himself, but informed the testator that he could make no arrangement with him until he had conferred with his (Guy's) wife and children. In about the month of May, 1871, the testator came to the home of Guy Markham, in the town of Rush, and remained there as one of the family till he died, in August, 1872.

Guy Markham lived on a farm of 250 acres in the town of Rush, owned by him, but the business of the farm was carried on by the defendant, William G. Markham, and in his name, and it was understood that all the produce of the farm belonged to William G., without, so far as appears, any definite agreement. Guy Markham had also three daughters, who superintended the household matters, and it was understood in the family that the said three sisters were jointly interested with William G. in the avails of the farm, although no definite arrangement to that effect existed between them. Guy Markham and his wife lived in the family. One of the daughters, Mrs. Puffer, resided with her husband in South Carolina, but was generally at her father's house in Rush, during the summer. Another one of the daughters, Mary, was frequently absent from home. The testator appears to have been a carpenter by trade, but had been engaged in carrying on a bookstore in Kalamazoo, in copartnership with the appellant's husband. After the testator came to Rush, he fitted up a room in the house for himself, and occupied the same until his death. Soon after he came to Rush, some talk was had about the terms on which he was to live there, but no definite agreement was made until some time about the month of July, 1872, when the children all being at home, the testator caused them all to be assembled together with

Guy Markham and his wife, stating that he wished to get the family all together, to state to them what the bargain was, in relation to his living there, and it was then arranged between the testator and the said family of Guy Markham that they should support him as long as he lived, and for such care and support he was to give them all his property. This was said to the children individually, and it was then understood that if one failed to furnish such care and support the other would do it. There was nothing agreed as to when the property was to be delivered, or as to the manner in which it was to be conveyed or secured; and it was not the understanding of the parties that the property or any part of it should be delivered in the lifetime of the testator, but the same was to be used and controlled by the testator during his life. The auditor to whom the matter was referred reports, as a matter of fact, that the agreement was made by and between the testator and the four children, but the opinion of the auditor on matters of fact was not controlling to the surrogate. The whole evidence was before him, and is before this court. We think it quite uncertain upon the testimony whether or not the four children of Guy Markham were the only persons whom the testator supposed were to agree to furnish him the support, etc., which he intended to provide for. Guy Markham testifies that when he saw the testator in Michigan the latter said, "if he could come and live with me he expected I would have what he had; whoever took care of him should have what he had. He said he had no one else he wanted to leave his means with, but those who took care of him in his old age." \* \* \* "When we got home I told the children what proposition he had made, and if they agreed to it it would be all right. He told her [Guy Markham's wife] he wanted to live with us, and compensate us with his means."

Mr. Puffer states, in reference to the assembling together of the family, when the contract was made: "He wanted to see the whole family together to have it sanctioned, and have my consent to it."

Mr. and Mrs. Guy Markham were present at the conversation when the agreement was made, as members of the family. Guy Markham was the owner of the house in which the testator lived, and of the farm, from which, at all events, the principal part of his support was expected to be furnished, and was the head of the

family in which the testator desired and expected to spend his days. The children were, as Guy Markham says, "running the farm with his advice and consent." It does not appear that there was any definite arrangement on the subject, or any agreement for running the farm, but what Guy Markham might have put an end to at any time, by his mere volition. It does not appear that his children had any independent property which would enable them from their own means to furnish such support as he (the testator) desired. It appears to us, that the idea of the testator was, so far as any binding contract was to be made, that the agreement was with Guy Markham, and that the conversation at which the children were present was for the purpose of having the arrangement generally understood in the family, and acquiesced in. According to Puffer's testimony, at the time of assembly of the family, and after the conversation, in which such contract was made, was held, the testator said "that he was very glad that everybody consented, and that it was settled." The claim in the case is made in behalf alone of the executor and the other children of Guy Markham. It seems to us that the testator understood, at all events, that Guy Markham, the recognized head of the family, which he was dealing with as a family, was certainly interested, if not solely interested in the contract. On the other side, so far as any precise contract was intended, in fact, it was an arrangement which neither party contemplated at the time as a binding contract, founded upon a valuable consideration, between the testator and anybody, except Guy Markham, but in which, for the sake of harmony, the general acquiescence of the entire family was desirable.

The will of the testator, before referred to, appointed the defendant, William G. Markham, as one of the executors. He propounded it for probate, and he only of the persons named as executors took upon himself the trust and duties.

It was well known in the family that the testator had such a will, and on one occasion he went with Guy Markham to the neighboring village of Avon, with the avowed purpose of having his will changed. The executor admits that he knew the testator had a will, but did not know the contents of it. He had before told Guy Markham that "he wanted to alter it so that Shakespeare should not get any of his property." So that it was known in Guy Markham's



family not only that the testator had made a will, but that it was a will under which the testator, at least, was apprehensive that the husband of the appellant might claim some interest in the property he should leave, or some part thereof, which was wholly inconsistent with any agreement or settled determination that Guy Markham's family should have his entire property. It appears that on one occasion when he went to Avon, a neighboring village, for the avowed purpose of having his will changed, Guy Markham accompanied him, but he was readily persuaded by Guy to abandon the purpose for the time being, on the ground that it would be better to consult a lawyer of more experience than such as could be found at Avon — one that Guy suggested, residing at another place. There is much testimony tending strongly to show that the claim in behalf of the executor and the other children set up in the executor's account is an after-thought, and that it was not pretended by the executor, for a considerable period after the death of the testator, that he and his sisters were entitled to the whole of the testator's property after his death. The executor's letters and conversations clearly show that at first a claim to the entire property was not intended.

The plaintiff and her children are the only lineal descendants of the testator, his sole heirs at law, and the natural objects of his bounty as well as his universal legatees.

The estate of the testator, at the time of the arrangement with the family of Guy Markham, seems to have consisted almost entirely of personal property, such as bonds, mortgages and notes, and money deposited in bank.

The only interest he appears to have had in real estate at that time was some title or interest in two cemetery lots, one at Clarkson, in Monroe county, where his wife had been buried, and in which the testator desired and expected to be and was buried, and one at Kalamazoo. Probably these cemetery lots were not understood to be embraced in what the testator termed his property, or his "means," and were not intended by him, or understood by the other parties, to be embraced in the arrangement or understanding, such as it was, in reference to the disposition of his property after his death, as a compensation to those who should take care of him until he died. We do not think, therefore, that the supposed contract was void, under the statute of frauds, as an agreement to con-

vey real estate not in writing. But there are other objections to the parol proof of this supposed contract, which, in our view, are fatal to its operation as a definite contract. Such contracts have a tendency to subvert the statute of wills, and to do away with all those safeguards in respect to the posthumous disposition of property with which the law surrounds such instruments.

Where a party renders services to another in the expectation of a legacy, and in sole reliance on the testator's generosity, without any contract, express or implied, that compensation shall be provided for him by will, and the party for whom such services are rendered dies without making such provision, no action lies, but where, from the circumstances of the case, it is manifest that it was understood by both parties that compensation should be made by will, and none is made, an action lies to recover the value of such services. (*Martin v. Wright's Admrs.*, 13 Wend., 460; *Patterson v. Patterson*, 13 Johns., 379; *Jacobson v. Le Grange*, 3 id., 199; *Lisk v. Sherman*, 25 Barb., 433; *Quackenbush v. Ehle*, 5 id., 469; *Erben v. Lorillard*, 19 N. Y., 299; *Robinson v. Rayner*, 28 N. Y., 494; *Graham v. Graham*, 34 Penn. St., 475.)

There is, upon the authorities, no doubt that in a case where a certain and definite contract is clearly established, even though it involves an agreement to leave property by will, and it has been performed on the part of the promisee, equity in a case free from all objection on account of the adequacy of the consideration, or other circumstance rendering the claim inequitable, will compel a specific performance, though as an original question it might be considered doubtful whether in any such case, especially when the contract is sought to be established by parol testimony, so patent a means for the evasion of the provisions for the security of property, furnished by the statute of wills, should have been allowed. But courts of equity having been pressed by the hardship of particular cases, and the unreasonable and, perhaps, often fraudulent conduct of the decedent have made precedents on the subject which have resulted in the establishment, as a principle of equity law, that in such cases the court will often decree a specific performance, and charge those holding the property under the will with a trust for the benefit of the party to whom it was agreed to be given. (*Parrell v. Stryker*, 41 N. Y., 480.) But in the cases in which such con-

tracts are set up, and especially where they are attempted to be established by parol testimony, the temptation and opportunity for fraud is such that they are looked upon with suspicion, and the courts require the clearest evidence that a contract founded on a valuable consideration, and certain and definite in all its parts, should be shown to have been deliberately made by the decedent. (*Ogilvie v. Ogilvie*, 1 Bradf., 356; *Bowen v. Bowen*, 2 id., 336; *Williams v. Hutchinson*, 3 N. Y., 312; *Robinson v. Raynor*, 28 id., 494; *Lisk v. Sherman*, 25 Barb., 433, and cases before cited.) It is claimed that the contract relied upon in this case is within the statute of frauds, as one not to be performed within a year. In regard to this question the state of the law may be said to be uncertain. The case of *Dresser v. Dresser* (35 Barb., 573) went to the Court of Appeals, where, as stated by Mr. Abbott, two opinions on this point were delivered, one holding the contract void, the other, valid; but the court did not pass upon the question. (Table of Cases Criticised, 1 Abbott's Dig. of New York Reports, lxiv.) The case in 35 Barbour is stated to have been followed by the General Term in the third department in *Kent et al. v. Kent et al.* (1 Hun, 529), but the latter case is not fully reported.

But waiving the question arising upon the statute of frauds, we think the contract, as appearing in the evidence, is too uncertain to require a specific performance — such a performance as this executor has undertaken to render by his account. First. It seems to us, if it be admitted that the executor and his sisters were at all interested as contracting parties, yet Guy Markham was also interested as the principal party contracting with the testator. Second. The amount to be given, after the death of the testator, to the parties who should have supported and taken care of him till death, was obviously, as shown by the repeated declarations of the testator to various members of the family, intended as a compensation for such services, and to go to the person or persons only who had performed such services.

There was no contract to devise or bequeath to the executor and his sisters jointly, share and share alike, the entire amount of the testator's estate, and it is evident from the testimony that the services of all were not equal, or expected to be so. Third. The services to be rendered were uncertain in their character, not only in respect to

the time of continuance, but in regard to their nature and character. Fourth. The compensation to be made for the services was uncertain. It was not specifically agreed in what manner the property of the testator was to be conveyed or secured to the other parties. It was to be used and controlled by him during his life. There was no restraint by the supposed contract, upon the testator's power to dispose of the same, or any part thereof, during his life, and the amount which he should leave at his death was therefore wholly uncertain. The contract, therefore, by reason of its uncertainty, was one which a court of equity would not be under the necessity of compelling performance of. (*Stanton et al. v. Miller*, 58 N. Y., 192; *Robinson v. Rayner*, 28 id., 494; *Lisk v. Sherman*, 25 Barb., 433; *Neal's Exrs. v. Gilmore*, 79 Penn., 421.) The case of *Lisk v. Sherman* (25 Barb., 433), was quite similar to this in its leading features. There, the agreement was that the plaintiff was to live with and take care of the testatrix as long as the latter lived, and at her death was to have all the property which the testatrix should have at her death. A suit had been in the first instance commenced for the specific performance of the contract, and such relief had been denied. (See Opinion, p. 437.) Afterwards an action was commenced to recover damages at law for the breach of the contract, and on the trial thereof the court had admitted evidence to show the value of the property of the intestate at her decease, as governing the measure of damages. This was held error, and the opinion of the court, delivered by Justice WELLS, on the point of the uncertainty of the agreement, is as follows: "The uncertainties connected with this agreement forbid the idea that any pecuniary amount of compensation for the plaintiff's services could have been in the mind of either of the parties, or that either could have had in mind any standard by which their pecuniary value could be regulated or determined at the time the agreement was entered into. The services to be rendered were uncertain, both in respect to the time they were to continue, and as to their character and extent. The compensation, also, was equally uncertain."

In this case, the testator, a man in general good health and active for his age, came to reside in the family of his brother in May, 1871, doing chores and other light work about the farm as, at least, part compensation for his support. He died in August, 1872, after

an illness of two or three days. He left, after paying all funeral expenses and other charges of the executorship, the sum of \$5,542.96, the whole of which the executor has, by his account, undertaken to appropriate to himself and his sisters, by virtue of the agreement before referred to. It is manifest that the supposed compensation is, at all events, largely in excess of the services and support rendered. To allow such a claim to be enforced in behalf of the interested executor by a proceeding in the nature of a decree for specific performance, is not at all equitable in its results, and ought not to be permitted in a court of equity, unless as the consequence of an absolute and certain contract, clear and definite in all points, and performed by those who allege it. Certainly, the rule authorizing the parties who have rendered these services with an understanding that they were to receive compensation, to recover at law what the services are reasonably worth, is the more just, and less subversive of the statute of wills, and such, we think, is the rule to be derived from all the authorities. In the case of *Parsell v. Stryker* (41 N. Y.), relied upon by the auditor in his opinion, there was a specific agreement in writing to give the plaintiff a certain farm, unincumbered, except by a provision for the support of the mother and an imbecile sister of the plaintiff. The services agreed to be rendered by the plaintiff, had been rendered for many years. The case of *Parsell v. Stryker* was an action in equity for specific performance. The judgment in that case proceeded principally on *Johnson v. Hubbell*, a case in the Court of Chancery in New Jersey, where the son, having by devise from his mother received a larger proportion of her property than had been given to his sister, had, upon the earnest appeal of the father, and upon the promise of the latter that he would leave all his own property to the two children share and share alike, if the son would convey to the sister certain lands to equalize the situation of the brother and sister under the mother's will, the contract being made in the presence of and with the consent of the sister, the son had conveyed the land in question to his sister. The father died, having by his will disinherited the son. On a bill filed by the son for a specific performance of the father's contract, and for general relief, the chancellor refused a specific performance, but held for the daughter to retain the lands conveyed by the son in consideration of the

father's contract was unjust and fraudulent, and ordered her to reconvey those lands to the son. The other cases cited in the opinion in the case of *Parsell v. Stryker* are mostly cases arising upon precise ante-nuptial agreements and settlements, and the covenants therein contained. The case of *Jones v. Martin*, cited in the case in 41 New York, and also by Chancellor WILLIAMSON in *Johnson v. Hubbell* (*supra*), by mistake as from 3 Ambler, is, in fact, reported in 3 Anstruther. It was reversed in the House of Lords, and a full statement of the points in that case is to be found in a note to *Randall v. Willis* (5 Vesey, 262).

We think the true rule in such cases, especially when based upon weak and vague parol arrangements, is to be found in *Martin v. Wright's Administrators* (13 Wend., 460), and *Robinson v. Raynor* (28 N. Y., 494), and that in this case the claimants, whoever they may be, would only be entitled to recover for the actual value of the services rendered, as upon a *quantum meruit*, in an action before some tribunal competent to pass upon the disputed claim. Of course the amount to be recovered by the party or parties entitled to recover in such action, is to be settled by the tribunal before which it is presented for adjudication. It should be the amount which the board of the testator and his nursing during his last sickness were reasonably worth, deducting the value of his services upon the farm. The amount of his property left at his decease furnishes no criterion or standard by which the amount to be recovered is to be measured.

The appellant, in her petition of appeal to this court, amongst other things, alleges for error that the executor, in the account as finally settled by the surrogate, is charged with interest for six months only on the cash in bank at the time of the testator's death, \$216, whereas he should have been charged with interest from the time the letters testamentary were issued, on \$5,542.96, which would be, it is claimed, about \$1,160.76. It appears from the executor's own testimony that the money was at some time transferred to the private account of the executor in the bank to his account not as executor, but as a private individual. The time when this transfer took place is not mentioned. It appears that, up to the time of his death, the bank was, by some arrangement, allowing the testator a certain rate of interest on the deposit, and interest was credited to him on

the pass-book of the bank down to July 1, 1872, about a month before his death. The executor was interested as one of the owners in the bank. It should be ascertained at what time the executor caused the money to be placed to his private account, and all the interest due from the bank up to that time should be charged to him, and from that time interest at the rate of seven per cent up to the time when he filed his final account for settlement.

We think the credit to the executor for the \$260, counsel fees, and also of the sixty dollars for auditor's fees, was improper. There appears in the case no particulars or vouchers for these charges. At the time of presenting his final account, the executor then charged for counsel fees twenty-nine dollars only. We therefore conclude that the counsel fee subsequently allowed was for the employment of counsel in the litigation before the auditor, and afterwards in endeavoring to have the joint claim of himself and others allowed against the estate in his hands. The whole proceeding, whereby the executor attempted to get the joint claim of himself and others allowed in his final account, was, as we have seen, illegal and unwarranted. The expenses thereof were not incurred in behalf of the estate, but in the prosecution of his own private claim against the estate.

There can be no justice or propriety in compelling the appellant not only to defend the illegal and unjust claim against her property as legatee at her own expense, but also to pay the expenses incurred by the executor in attempting to enforce the claim in his own behalf and for his own benefit, contrary to the interests of the estate of which he was the trustee. The auditor's fees were, as we suppose, the fees paid to the auditor, on the reference to him, illegally obtained at the instance of the executor, and rest upon the same principle as the counsel fee of \$260. We think the counsel fee should be reduced to twenty-nine dollars, the amount originally charged by the executor, and the auditor's fees should not be allowed.

The decree of the surrogate appealed from is reversed, with costs of the appeal to the appellant, to be paid personally by the respondents and not out of the estate, and the proceedings are remitted to the surrogate of Monroe county, with instructions to settle the final account of the executor, upon the principles laid down in this

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FOURTH DEPARTMENT, APRIL TERM, 1877.

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opinion. The costs of the proceedings before the surrogate and of the executor on the appeal are not to be allowed out of the estate.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Ordered accordingly.

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ELIZABETH C. BENNETT, APPELLANT, v. WASHINGTON  
GARLOCK, RESPONDENT.

*Trustee takes only sufficient estate to fulfill trusts — Statute of uses — vested equitable estate in remainder — made a legal estate by — Rule in Shelly's Case — Statute of limitations — does not run against remainderman.*

This was an action of ejectment, brought by the plaintiff to recover the undivided one-third of a lot in the town of Frankfort. It appeared upon the trial, that on the 24th day of May, 1808, Martha Codd, wife of Matthew Codd, owned the lot in fee simple, subject to the marital rights of her husband, and was in possession thereof, and that plaintiff, the daughter of the said Martha and Matthew, was then living. That on that day the said Martha and Matthew executed an indenture whereby they conveyed the said premises, with others, to Varrick and Breese, "in trust, for the uses, intents, and purposes" (first) to sell so much as should be necessary to pay debts; (second) to lease, manage, etc., the same, and pay over the net profits of the residue thereof to the said Matthew and Martha for the terms of their natural lives, and (third) to "hold all the residue of said land, and over and above what may be sold as aforesaid for the payment of said debts \* \* \* for the sole use, benefit and behoof of such persons as shall be the right heirs of them, the said Matthew and Martha Codd, at the time of the death of the survivor of them," etc.

Martha Codd survived her husband, and died in 1871, the land being then held by a trustee appointed by the court in place of Varrick and Breese. *Held,*

- (1) That the trustee took only such an estate as was necessary to enable him to fulfill the purposes of the trust, and that such estate terminated upon the death of the survivor of the said Matthew and Martha;
- (2) That the plaintiff, under the statute of uses, took a legal vested estate in remainder, immediately, upon the execution of the deed;
- (3) That the rule in *Shelly's Case* did not apply, the estate of the grantors being equitable and that in the heir a legal estate, and hence plaintiff took by purchase and not by descent.

The deed provided that the grantors might, by a joint will or appointment, direct and appoint the persons to whom the residue of the estate should go, and also authorized the trustee, upon their request, in writing, to sell any portion thereof. *Held,* that as such powers had never been exercised they were of no importance in ascertaining the rights of the parties created by the deed.



The defense interposed in the action was that of an adverse possession commenced in 1842. *Held*, that as the trustee under the deed in no way represented or was bound to protect the interests of the plaintiff, the statute did not commence to run against her until her right of action accrued, upon the death of her mother, in 1871.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court without a jury.

*Edward C. James*, for the appellant. If, by the trust deed of May 24, 1808, the plaintiff became vested with a future or expectant estate in said lands, whether legal or equitable, then a title by adverse possession against such estate during the continuance of the life estates was impossible, for the law is well settled that no possession can be deemed adverse to a party who has not, at the time, the right of entry and possession. (*Webster v. Cooper*, 14 How. [U. S.], 488; *Carver v. Jackson d. Astor*, 4 Peters, 1; *Devyr v. Schaefer*, 55 N. Y., 446; *Jackson v. Schoonmaker*, 4 Johns., 390; *Jackson v. Sellick*, 8 id., 262; *Jackson v. Johnson*, 5 Cowen, 74; *Jackson v. Mancius*, 2 Wend., 357; *Clark v. Hughes*, 13 Barb., 147; *Randall v. Rabb*, 2 Abb. Pr., 307; *Wells v. Prince*, 9 Mass., 508; *Wallingford v. Hearl*, 15 id., 471; *Doe d. Carson v. Edmonds*, 6 Meeson & Welsby, 295.) A trustee takes that quantity of interest only which the purposes of the trust require, and the instrument creating it permits. The legal estate is in the trustee so long as the execution of the trust requires it, and no longer; and then it vests in the person beneficially entitled. (*Nicoll v. Walworth*, 4 Denio, 385, 388; *Webster v. Cooper*, 14 How. [U. S.], 488, 499; *Perry on Trusts*, § 319, 320; 4 Kent Com., 204; 1 R. S., 730, § 67.) The power of sale to pay debts required no estate to be vested in the trustees. It never attached to the land, for the court finds that there is no evidence of any debts, dues or demands against Matthew and Martha Codd, or either of them, subsisting or existing, May 24, 1808. If such debts had then existed, this power, or trust, would cease as soon as they were, in any mode, paid or extinguished. (*Selden v. Vermilyea*, 3 N. Y., 525; *Kittell v. Osburn*, 4 T. & C., 45; *Heardson v. Williamson*, 1 Keen, 34.) Indeed, it would cease as soon as the trustees might, with due diligence, have discharged them, for they cannot

prolong their estate by a neglect of duty. (*Carter v. Barnardiston*, 1 P. Wms., 518; *Salk*, 153.) The deed vested in the trustees a legal estate in said lands commensurate with the purposes of said trust, to wit, an estate *pur autres vies*, or during said two lives. On the expiration of said lives, the purposes of this trust would cease, and the estate of the trustees would then also cease. (2 Jarman on Wills, 213, 214; *Welch v. Allen*, 21 Wend., 147; *Blacker v. Anscombe*, 4 Bos. & Pul., 25; *Bain v. Matteson*, 54 N. Y., 663.) Under the third clause of the trust deed of 1808, the plaintiff, who was living when said deed was executed, became immediately vested with a legal estate in remainder limited by way of use. Remainders, whether vested or contingent, may be limited by way of use, as well as at the common law. (2 Washburn on Real Property, chap. 2, §§ 2-8; 4 Kent's Commentaries [m. p.], 205, 237, etc.; 1 Saunders on Uses, 105, 106; 1 Cruise, title 11, chap. 3, §§ 5, 19, 22 and note 1; 2 id., title 16, chap. 5, §§ 1, 15, 16, 17; Act Concerning Uses, passed Feb. 20, 1787; 1 Greenleaf's Laws, chap. 37, p. 361.; *Reformed Dutch Church v. Veeder*, 4 Wend., 494; *Carver v. Jackson d. Astor*, 4 Peters, 1, 90.) It had been uniformly held that a grant or devise to trustees and their heirs to receive the rents and profits of lands and pay them to A and B for their lives, and to stand seized of, or hold said lands, for the use and behoof of their children, vested a valid legal estate in remainder in such children. (*Jones v. Say & Sele*, 3 Brown's Parl. Cas., 458; *Shapland v. Smith*, 1 Brown's Ch. Cas., 75; *Doe d. Hallan v. Ironmonger*, 3 East, 533; *Doe d. Terry v. Collier*, 11 id., 377; *Silvester v. Wilson*, 2 Term R., 444; *Doe d. Willis v. Martin*, 4 id., 39; *Foster v. Hayes*, 2 El. & Bl., 27; 4 id., 717; Lewin on Trusts, 253, 254; *Carver v. Jackson d. Astor*, 4 Peters, 1, 90; *Webster v. Cooper*, 14 How. [U. S.], 488, 497, 498; *Ward v. Amory*, 1 Curtis C. C., 419; *Ware v. Richardson*, 3 Md., 505; 2 Am. Law Reg., 485; *Green v. Green*, 23 Wallace, 486, 491; *Vanderheyden v. Crandall*, 2 Denio, 9; 1 N. Y., 491; *Belinger v. Shafer*, 2 Sandf. Ch., 293.) In this case the plaintiff was born before the trust deed was executed. The three conditions necessary to the execution of this use in remainder under the statute were then complete; and it immediately vested in her in fee, although subject to open and let in after-born children. (4 Kent's

Commentaries, 205; *Doe d. Barnes v. Provoost*, 4 Johns., 61; *Nodine v. Greenfield*, 7 Paige, 544, 548; *Carver v. Jackson d. Astor*, 4 Peters, 1, 90; *Doe d. Poor v. Considine*, 6 Wallace, 458, 473; *Right v. Creber*, 5 Barn. & Cress., 866; *Doe d. Bills v. Hopkinson*, 5 Queen's Bench, 223; *Doe d. Comberback v. Perryn*, 3 Term R., 484; *Williamson v. Field*, 2 Sandf. Ch., 533; *Moore v. Littel*, 41 N. Y., 60; *Provoost v. Colyer*, 62 id., 545, 552.) The proviso in the third clause by which the parents reserve the right to appoint by their joint will to whom the remainder shall go; and the provisions of the fourth clause by which the trustees are given a discretionary power of sale to be exercised upon the joint written request of the parents, do not alter the character of the plaintiffs estate as a vested remainder in fee. The only effect of these powers is to render the remainder liable to be defeated by their exercise. But until they are exercised the estate remains vested and undisturbed. (*Doe d. Willis v. Martin*, 4 Term R., 39, 63; *Cunningham v. Moody*, 1 Vesey, Sr., 174, 177; *Foster v. Hayes*, 2 El. & Bl., 27; 4 id., 717; *Carver v. Jackson d. Astor*, 4 Peters, 1, 90; *Ward v. Amory*, 1 Curtis C. C., 419, 425; 4 Kent's Com., 204.) When lands are given to trustees and their heirs in trust to receive the rents and profits and pay them to A for life, and to stand seized of said lands to the use of the heirs of his body upon A's death, the remainder so granted is a legal estate during the life of A, and does not unite with his equitable estate for life under the rule in *Shelly's Case*. (*Jones v. Say & Sele*, 3 Brown's Parl. Cas., 458; *Shapland v. Smith*, 1 Brown's Ch. Cas., 75; *Doe d. Hallan v. Ironmongers*, 3 East, 533; *Doe d. Terry v. Collier*, 11 id., 377; *Goodlittle d. Hayward v. Whitby*, 1 Burrows, 228; *Blaker v. Ancombe*, 4 Bos. & Pul., 25; *Warter v. Hutchinson*, 5 Moore, 143; 1 B. & C., 721; *Carver v. Jackson d. Astor*, 4 Peters 1; *Ward v. Amory*, 1 Curtis C. C., 419, 427; *Ware v. Richardson*, 3 Md., 555; 2 Am. Law Reg., 485; *Green v. Green*, 23 Wallace, 486, 491.) When lands are given to trustees and their heirs to receive the rents and profits and pay them to A for life, and upon his death the lands are to go to the heirs of his body, the remainder is a legal estate during the life of A, and does not unite with his equitable interest for life, under the rule in *Shelly's Case*. (*Silvester v. Wilson*, 2 Term R., 444; *Collier v. McBean*, 34 Beavan, 426;

*Mogg v. Mogg*, 1 Merivale, 654, 678, 689; *Playford v. Hoare*, 3 Young & Jervis, 175; *Doe d. Muller v. Claridge*, 6 M., G. & S., 641; *Thurston v. Thurston*, 6 Rhode Island, 296.) When lands are given to trustees and their heirs to permit A to receive the rents and profits for life, and to hold in trust for the heirs of A during his life, the remainder is a legal estate during the life of A, and does not unite with his equitable interest under the rule in *Shelly's Case*. (*Biscoe v. Perkins*, 1 Vesey & Beames, 485; *Vanderheyden v. Crandall*, 2 Denio, 9, 17; *Webster v. Cooper*, 14 How. [U. S.], 499.) When lands are given to trustees and their heirs to hold to the use of A for life, and after his death to the use of the heirs of his body, the remainder is a legal estate during the life of A, and hence unites with A's legal estate under the rule in *Shelly's Case*, unless the word heirs is used as a *descriptio personarum*. (*Curtis v. Price*, 12 Vesey, 89; *Doe d. Willis v. Martin*, 4 Term R., 39; *Doe d. Turner v. Dorvell*, 5 id., 518; *Doe d. Littledale v. Smeddle*, 2 Barn. & Ald., 126; *Owen v. Smith*, 2 H. Blackstone, 594; *Foster v. Hayes*, 2 El. & Bl., 27; 4 id., 717; *Marshall v. Hill*, 2 Maule & Selwyn, 608.) When lands are given to trustees and their heirs to receive the rents and profits and pay them to A for life, or to permit A to receive them, or in trust to hold to the use of A for life, and upon his death to convey to his heirs, children or appointees, then the remainder is an equitable estate during the life of A, and the remainder-man can only acquire the legal estate through the conveyance. (*Mott v. Buton*, 7 Vesey, 201; *Phipps v. Ackers*, 9 Cl. & Fin., 583; 4 M. & G., 1107; *Doe d. Booth v. Edlin*, 4 Ad. & El., 582, 591; *Clarke v. Davenport*, 1 Bosw., 95, 114, 115; *Williamson v. Field*, 2 Sandf. Ch., 533; *Pitcher v. Carter*, 4 id., 1; *Wood v. Mather*, 38 Barb., 473; 44 N. Y., 249.)

*S. Earl*, for the respondent. The deed in trust to Breese and Varrick in 1808 vested in them, and their heirs and assigns, the legal estate and the whole thereof in respect to the lands therein mentioned. (*Bradstreet v. Clark*, 12 Wend., 659; *Belmont v. O'Brien*, 12 N. Y., 394; *Bain v. Matteson*, 54 id., 666; *Anderson v. Mather*, 44 id., 249.) In this case the *cestui que trust*, Mrs. Bradstreet, had no particular estate. The heirs of the grantors creating the trust, had no remainder. The trustees were vested with the legal title and clothed

with all its incidents, subject only to the execution of the trusts. If under this deed the plaintiff had any right, she could have compelled the trustees to protect it, and failing to do so, they would be legally responsible in damages. (2 Perry on Trusts, § 816; 2 Story Eq. Jur., § 1389.)

TALCOTT, J.:

This is an appeal from a judgment rendered at the Circuit Court in Herkimer county, after a trial by the court without a jury. The action is ejectment, to recover an undivided third part of great lot No. 79 in Cosby's manor, in the town of Frankfort, Herkimer county, and was commenced on the 21st day of October, 1874.

The case commences with the statement that the plaintiff proved that Martha Codd, wife of Matthew Codd, was, on the 24th day of May, 1808, the owner in fee simple of the premises described in the complaint, subject to the marital rights of her husband, and that she and her husband were in possession thereof.

The plaintiff is the daughter of the said Matthew and Martha Codd, and was born before the said 24th of May, 1808. This, of course, established a *prima facie* title in the plaintiff, and entitled her to recover; but the plaintiff, anticipating a defense of title by alienation of the ancestor, or by adverse possession, went farther and showed that on the 24th of May, in the year 1808, the said Matthew Codd of the first part, and said Martha Codd, his wife, of the second part, and Samuel S. Breese and Abraham Varrick of the third part, made and executed an indenture of that date, whereby the parties of the first and second part (Matthew and Martha Codd), for "and in consideration of one dollar to them in hand paid, and in order to effect the uses and purposes hereinafter mentioned," did grant, release and convey unto the parties of the third part, their heirs and assigns, "all the lands, tenements, hereditaments and real estate whatsoever or wheresoever, whereof they the parties of the first and second part were, or whereof either of them was seized or entitled to, either in law or in equity, with all and singular the rights, interests, property and estate which the parties of the first and second part were, or either of them was, then seized or entitled, either in law or in equity, to have and to hold, unto the said parties of the third part, and their heirs and assigns, as joint tenants, and

not as tenants in common, in trust, for the uses, interests and purposes thereafter set forth."

These uses were, in brief: First, to sell and dispose of so much of the said lands, tenements, etc., as shall be sufficient to pay and discharge all debts, etc., then subsisting against the parties of the first and second parts, or either of them. Secondly, in trust as to the residue of said lands and tenements, to lease, manage, cultivate and improve the same in such manner and upon such terms and conditions as to said trustees, or the survivor of them, or their heirs and assigns, or of the survivor, shall from time to time deem proper, and most for the interest and benefit of the parties of the first and second part, or the survivor of them, the net profits and avails whereof are to be paid and accounted for to the said Matthew Codd during his lifetime, quarterly, or as often as may be reasonably required by him for the support and maintenance of said Matthew and Martha Codd and their children; and if said Martha Codd shall survive her said husband, then the said net profits or avails are to be paid and accounted for to her quarterly, or as often as may reasonably be required by her, during her natural life, for the maintenance of herself and said children. Thirdly, in trust and upon this express intent that said trustees, and the survivor of them, and the heirs and assigns of such survivor, shall hold all the residue of said lands, etc., over and above what may be sold as aforesaid for the payment of said debts as aforesaid, for the sole use, benefit and behoof of such persons as shall be the right heirs of them, the said Matthew and Martha Codd, at the time of the death of the survivor of them; that is, to their children or grandchildren, or such other person as by the laws of the State of New York would be heir or heirs of the said Matthew and Martha Codd at the time of the death of the survivor of them, if this deed had not been made. Provided, however, and it is expressly intended, that in order to secure the respect and obedience of their children and grandchildren, or other representatives, the said Matthew Codd and Martha Codd may, if they can agree and deem it proper, by their joint will or appointment, in due form of law to be executed, direct and appoint the persons to whom and for whose use the said trust estate of the said residue of said lands shall go, upon the decease of the survivor of said Matthew and Martha Codd, which will or appointment so jointly

executed as aforesaid may be revoked or annulled by a proper instrument in writing, by either of said Matthew or Martha Codd, at his or her pleasure, and in case of such revocation the said estate shall go to their right heirs aforesaid.

By the fourth clause of said deed, it was provided that if at any time the said Matthew and Martha Codd should, by instrument in writing, request the trustees to sell and convey any portion of said lands over and above what might be necessary for the payment of said debts, the said trustees were authorized to comply with said request, but a compliance with such request was to be discretionary, and not obligatory, upon the trustees.

The deed was executed in presence of Jonas Platt and Abram M. Walton. An explanatory instrument was afterwards, and on the 24th of May, 1808, executed by Matthew and Martha Codd, by which it was declared that the true intent and meaning of the principal deed was that the trustees, the survivor, or the heirs and assigns should not be accountable for, or obliged to pay over, the net profits or avails of the estate, until the same should be actually received by the trustees, the survivor or his heirs and assigns.

The deed was acknowledged on the 28th day of June, 1808, and was recorded in the Oneida county clerk's office, on the 30th day of June, 1808. On the 6th day of July, 1814, Breese and Varrick, in pursuance of a decree in the Court of Chancery, conveyed to Thomas Addis Emmett, his heirs and assigns, as sole trustee, upon the same trusts under which the lands were held by them. Emmett accepted the trust. Thomas Addis Emmett died in the year 1827, but no trustee was appointed to succeed him until March, 1855, when Thomas Cunningham was, under the authority of a judgment of the Supreme Court, rendered December 22, 1854, in an action wherein Martha Bradstreet, formerly Martha Codd, was plaintiff, and the heirs of Thomas Addis Emmett were defendant, appointed such trustee, and the heirs of Emmett conveyed to him upon the same trusts. The deed to Cunningham contained a full recital of the previous trust deeds and the proceedings of the court in reference to the continuance and transfer of the said trust estate. It was recorded in Herkimer county, April 23, 1855, but the original trust deed to Breese and Varrick was not otherwise recorded in Herkimer county. By a decree of the Court of Chancery, on the 16th day of June, 1817, in

a suit in which Martha Codd was plaintiff and Matthew Codd defendant, the marriage contract between the parties was dissolved, and each party freed from the obligations thereof, and the care and control of their children was awarded to said Martha, and the said Matthew was directed to deliver over to her all deeds, leases or papers, which related to any lands which belonged to her at the marriage, or which had descended to or devolved upon her, or been acquired for her use, since that time. By an act of the legislature, soon afterwards passed, the said Martha and her children were authorized to and did assume the surname of Bradstreet (which had been her maiden name), by which name they have since been called.

Soon after said divorce, Matthew Codd absented himself and has not since been heard from, and it was admitted that he died before the said Martha. Said Martha Bradstreet, formerly Martha Codd, died in Chenango county, New York, December 16, 1871, aged ninety-three years, and at her death the heirs of said Martha Bradstreet and Matthew Codd, were as follows: Elizabeth C. Bennett, the plaintiff in this suit, Edward L. Bradstreet and four grandchildren, the children of a deceased daughter, Sarah Sterling. No joint will or appointment was ever made by said Martha and Matthew, and none of the property has been conveyed by any of the trustees, and no conveyance has been executed by said Cunningham, the last trustee, to the said heirs or any of them. The defense to the action was adverse possession for more than twenty years, by the defendant and those under whom he claims. The defense was sustained by the justice before whom the action was tried, upon the ground that the trustees under the deed of 1808 took the entire fee, and that the interest conveyed to the plaintiff by that deed was only an equitable interest until the death of Martha Bradstreet, and being a mere equitable interest, the title of the plaintiff was represented by the trustee and barred by a disseizin or adverse possession, which ran against the trustee as such.

In view of the ground upon which the defense was sustained, it becomes important to inquire what sort of an estate the plaintiff took under the deed of 1808. By that deed an active and valid trust was created. First, for the payment of the debts of the grantors. Second, to lease, manage, cultivate and improve the estate for the benefit of the grantors, and the survivors of them,



paying over the net profits to said Matthew during his life for the support of said Matthew and Martha and their children; and if said Martha should survive Matthew, then to account to her during her natural life for the net profits. These were active trusts, valid at the time of their creation, and the deed conveyed to the trustees the legal estate, to have and to hold during the lives of Matthew and Martha Codd, and the life of the survivor, and so much longer as should be necessary for the discharge of the debts. (See the case of *Bain v. Mattison*, partially reported, 54 N. Y., 663, in which this deed came under examination.) The power of discretionary sale at the request of the grantors, and the power of appointment by joint will reserved to the grantors never having been exercised, are of no importance in ascertaining the interests of the parties. If exercised they might defeat subsequent estates, but until exercised they have no effect. (*Doe dem. of Willis v. Martin*, 4 Term R., 39-63; *Carver v. Jackson dem. of Astor*, 4 Pet., 1-90.) After the two active trusts before mentioned, the deed proceeds to provide that the trustees, and the survivor of them, and his heirs and assigns, shall hold all the residue of said lands "for the sole use, benefit and behoof of such persons as shall be the right heirs of them, the said Matthew and Martha Codd, at the time of the death of the survivor of them, the said Matthew and Martha Codd; that is, to their children or grandchildren, or such other person as by the laws of the State of New York" would be their heirs if the deed had not been made. This remnant of the property not disposed of under or by virtue of any of the preceding powers or trusts is a remainder. A remainder is defined by KENT to be "a remnant of an estate in land, depending on a particular prior estate, created at the same time and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it." The word remainder is not a term of art necessary to be used in the creation of a remainder. (1 Greenlf. Cruise, 277; 2 Wash. on Real Prop., 547 [4th ed.].) The remnant of the estate which might remain was, then, a remainder conveyed under the name of "residue," and was to take effect after and as soon as the active trusts mentioned in the deed were satisfied. The act concerning uses, in force at the time when the deed was executed, was the act of February 20, 1787 (1 Greenlf. Laws, 1787, ch. 37, p. 361), and is, in substance, the same

as the English statute of uses. (27 Hen. VIII, ch. 10.) It provides, amongst other things, "that when any person should be seized of any estate in remainder, to the use of or in trust for another, the *cestui que use* should thenceforth stand and be seized, deemed and adjudged in lawful seizin and estate of such remainder, and that the estate, right and title of the trustee should from thenceforth be deemed and adjudged to be in the *cestui que use*, after such quality, manner, form and conditions as said *cestui que use* before had in the use. The effect of this statute was, as was held both in law and equity, in all cases of a mere "naked use" or "passive trust," to transfer the legal title forthwith from the trustee to the *cestui que use*, by a process called "executing the use," whereby so much of the legal title as appertained to the use in question was said to be immediately, and by the same conveyance drawn out of the trustee and vested in the beneficial owner. By the Revised Statutes of 1830 (vol. 1, p. 727), it is declared (§ 46 of the Statute of Uses and Trusts) that every estate which is now held as an use, executed under any former statute of this State, is confirmed as a legal estate. But by section 48 of the statute, the estate of the trustees in any existing trust, "where the title of such trustees is not merely nominal, but is connected with some power of actual disposition or management in relation to the lands which are the subject of the trust," was saved from the general abolition of trusts; and by section 45 it was provided that every estate and interest in lands, except as authorized and modified in that article, should be deemed a legal right. The remainder to the heirs of Matthew and Martha Codd was not connected with any management or control of the lands, or any disposition thereof, by the trustees after the death of the survivor of the grantors. The trustees were not required or empowered to convey the remainder to the heirs of the grantors, nor were they to preserve contingent remainders, and no act authorized or required to be done by the trustees, after the active trusts mentioned in the deed were satisfied, can be suggested.

The remainder was either vested or contingent. An estate is vested when there is an immediate right of personal enjoyment, or a present fixed right of future enjoyment. (4 Kent, 202.)

Kent says: "The definition of a vested remainder appears to be accurately and fully expressed in the New York Revised Statutes,

and is as follows : when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate."

Where a remainder is so limited as to take effect in possession, if ever, upon the determination of a particular estate, which estate is to determine by an event which must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainderman is *in esse* and ascertained, provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession. If the estate is limited over to another, in the event of the death of the first remainderman, before the determination of the particular estate, his vested interest will be subject to be divested by that event. (*Moore v. Lyons*, 25 Wend., 119; Chancellor's Op., 144.)

The plaintiff was *in esse* at the time the deed of 1808 was executed. She then would have had an immediate right to the possession of the lands upon the ceasing of the precedent estate. True, the right might have been divested by the death of the plaintiff without issue, before the decease of her mother, and so the remainder would never have actually taken effect in possession, but it is the present capacity of taking effect in possession if the possession were to become vacant, which distinguishes a vested from a contingent remainder. (See *Lawrence v. Bayard*, 7 Paige, 70; *Moore v. Little*, 41 N. Y., 66; *Sheridan v. House*, 4 Keyes, 569; *Chism v. Keith*, 1 Hun, 589; *Howell v. Mills*, 56 N. Y., 226; *Embury v. Sheldon's Exrs. et al.*, MSS., Court of Appeals, N. Y. Weekly Digest, March 12, 1877.) The plaintiff then took a vested remainder under the deed of 1808. It was a mere "naked use" or "passive trust" and, by virtue of the statute of uses of 1787, was executed by conferring a legal estate upon her *eo instanti* when the remainder was created. But what was the estate of the trustees under the deed? It was well settled before the Revised Statutes of 1830 that the trustee takes that amount of interest only, both as to duration and amount, which the purposes of the trust require, and the instrument creating the trust permits, and whether the conveyance to the trustee be with or without words of inheritance, he takes an estate sufficient for the execution of the trust—neither more nor less. (4 Kent, 204; Perry on Trusts, 319, 320; *Nicoll v. Walworth*,

4 Denio, 385.) It is also enacted by the statute of uses and trusts of 1830, section 67. When the purposes for which an express trust shall have been created shall have ceased, the estate of the trustees shall also cease. This statute applies to trusts created before the Revised Statutes took effect. (*Bellinger v. Shafer*, 2 Sandf. Ch. [m. p.], 293; *Eckford v. DeKay*, 8 Paige, 89-94; S. C., on appeal, 26 Wend. 29.) The trustees therefore\* took no estate under the deed to endure longer than until the purposes for which the express trusts were created ceased.

There was no evidence that any debts existed against the said Matthew and Martha Codd, or either of them, at the time of the execution of the deed of 1808, and there is no proof that any of the trustees have attempted to dispose of any of the lands embraced in the trust, for the payment of debts or otherwise. It is suggested, and perhaps is probable, that the insertion of the power of sale for the payment of debts, was a matter of form, to relieve the transaction from any suspicion of an intent to hinder, delay, or defraud creditors. Perhaps it was inserted as a matter of precaution, to protect the deed against the allegation of a fraudulent intent, in case any debt or debts of the grantors, or either of them, not then remembered or recognized, should afterwards be made to appear. However this may be, if in fact any such debts existed at the date of the deed, the trust, so far as it was upheld by the power of sale for the payment of debts, would cease when they were in any manner paid or extinguished. (*Selden v. Vermilya*, 3 N. Y., 525.)

The deed appears to have been an open transaction, put upon the public records in the county where the grantors resided soon after its execution, and it does not appear that any creditor has made any claim for a debt due at that time, or claimed to be in any manner interested in the trust, or its execution; and we agree with the learned justice before whom the cause was tried, that any debts that may have existed against the grantors, or either of them, in the year 1808, must, from the lapse of time and the absence of proof, be presumed to have been extinguished prior to 1871, when Martha Bradstreet died.

The trust for Martha and Matthew Codd, could, by its terms, endure only for their lives and the life of the survivor, and it was provided, therefore, by the deed, that when the debts, if any, were

extinguished, and the survivor of said Matthew and Martha should die, the estate of the trustees should cease.

Leaving out of view, then, the trust, if it were a trust for the payment of debts, the trustees took an estate *pour autres vies*, viz., for the lives of Martha and Matthew Codd, and the survivor of them. The plaintiff took a vested remainder in fee, subject to being defeated by her death without issue, before the termination of the life estate. The remainder was executed by the statute of uses, and was by virtue of that statute a legal estate.

The adverse possession commenced in the year 1842. The estate of the plaintiff did not coalesce with the estate of her parents, under the rule in *Shelly's Case*, if for no other reason, because the estate of the plaintiff was a legal estate, and that of her ancestor was merely equitable. Matthew and Martha Codd were *cestuis que trust* under the deed, and during and for their lives and the life of the survivor, the legal title to the estate was vested in the trustees. In order that the rule in *Shelly's Case* should apply, so that the heir in remainder is held to take by descent and not by purchase, the life estate and the remainder must both be of the same character; that is, both legal or both equitable estates. If one be legal and the other equitable, they do not unite in the ancestor, and the heir, as remainderman, takes by purchase and not by descent. (2 Wash. on Real Prop., 600 [4th ed.]; 1 Perry on Trusts, § 358.)

The adverse possession, then, to be available as a defense, must be good as against the plaintiff who took, as a remainderman, by purchase and not by descent, a vested legal estate. But the plaintiff was not entitled to the possession of the estate until the expiration of the precedent estate for life. The statute did not commence to run against her, at common law, until the right of entry accrued. The trustees of the precedent life estate owed no duty as such to her, and in no way represented her. See *Carver v. Jackson ex dem. Astor* (4 Peters, 1), where it was held that an adverse possession of fifty years was unavailing against the title of a remainderman, whose right of entry accrued within twenty years. The case also involves other questions quite similar to those presented in the case at bar. See, also, *Jackson v. Schoonmaker* (4 Johns., 402).

The Revised Statutes also declare this principle in clear and comprehensive language, as follows: "No expectant estate can be

defeated or barred by alienation or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseizin, forfeiture, surrender, merger or otherwise." (1 R. S., 725, § 32.) The adverse possession is claimed to have commenced in 1842, and was limited in its operation and effect by this provision of the Revised Statutes. The disseizin, therefore, could not commence to operate as a bar to the plaintiff so long as her estate was in expectancy instead of actual possession. It was in expectancy until the death of her mother, Martha Bradstreet, in the year 1871.

The learned judge at the Circuit held that neither the defendant nor those under whom he claims, acquired the legal title by virtue of any of those conveyances which are set up as the foundation of the adverse possession, and no point is made to the contrary by the counsel for the defendant on this appeal, so that it is unnecessary to examine any question save that of the adverse possession. Without, therefore, holding that the expectant estate of the plaintiff, if of an equitable character, would, since the Revised Statutes, have been barred by the adverse possession, which was proved in this case, we are of opinion that the learned judge, before whom the cause was tried, was in error in holding that the estate of the trustees was, by the deed, to endure beyond the lives of the grantors, and that the right of the plaintiff was merely that of a *cestui que trust*. We think she took a vested remainder in fee, executed by the statute of uses, under the deed of 1808, and such remainder was protected from destruction by any laches on the part of the trustees, or *cestuis que trust* for life, until her right of entry accrued in 1871, on the decease of her mother, Martha Bradstreet, the survivor of the *cestuis que trust* for life. If these views are correct, the plaintiff should have recovered.

Judgment reversed and a new trial ordered, costs to abide the event.

SMITH, J., concurs. MULLIN, P. J., not having heard the argument, does not vote.

Judgment reversed and new trial ordered, costs to abide the event.

CHARLES D. CASTLE AND AARON ERICKSON, RESPONDENTS, v. CHARLES S. BEARDSLEY, APPELLANT.

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*Statute of frauds — promise to answer for the debt of another — consideration must appear in note or memorandum.*

Where a promise is made to answer for the debt, default or miscarriage of another person, the consideration thereof must appear either expressly or by necessary implication, in the note or memorandum in writing required by the statute.

Chapter 464 of 1863, by repealing so much of the Revised Statutes as required a "note or memorandum *expressing the consideration*" to render such a promise valid, restored the law on this subject to the state in which it was prior to the adoption of the Revised Statutes.

*Speyers v. Lambert* (1 Sweeny, 835) not followed.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

*William C. Cox*, for the appellant. The agreement, on which plaintiffs declare, is void for want of consideration. (Browne on Statute of Frauds, 403, §§ 387 to 408, inclusive; *Wright v. Wees*, 25 N. Y., 151; *Kenworth v. Schofield*, 2 Barn. & Cress., 945; *Mallory v. Gillett*, 21 N. Y., 412; *Sears v. Brink*, 3 Johns., 215; *Baily v. Ogden*, id., 411; *Thompson v. Blanchard*, 3 Comst., 335; Bingham on Real Property, 341 to 368; *Staats v. Howlett*, 4 Denio, 559; *Leonard v. Vredenburg*, 3 Johns., 29; *Rogers v. Kneeland*, 10 Wend. 219; *Douglas v. Howland*, 24 id., 35; *Eno v. Woodworth*, 4 N. Y., 249; *Abeel v. Radcliff*, 13 Johns., 297; *Jackson v. Sill*, 11 id., 201; 1 Philips' Ev., 547; *Webb v. Rice*, 6 Hill, 219; *Stevens v. Cooper*, 1 Johns. Ch., 429; Smith on Contracts [67], 81, and cases cited; Smith's Mercantile Law, 577; *Peltier v. Collins*, 3 Wend., 452.) The amendment to Revised Statutes striking out the words "expressing the consideration" has not materially affected the requirement of the statute; it does not say that no consideration is necessary to an agreement; it merely leaves the law as it was before 1831. (*Church v. Brown*, 21 N. Y., 315 to 331; Bingham on Real Property, 363.)

*Harris & Cooke*, for the respondents.

TALOOTT, J. :

This is an appeal from a judgment in favor of the plaintiffs, rendered at the Monroe Circuit, on a trial by the court without a jury. The plaintiffs, as partners, under the copartnership style of "The Rochester Native Wine Company," were the holders of two promissory notes for \$100 each, made by Charles S. Beardsley and one Owens, as partners, under the style of "Beardsley & Company," payable to the order of, and indorsed by, H. W. Beardsley. The notes matured in June and July, 1873. Payment thereof was duly demanded at maturity. They were not paid, and the indorser was duly notified of the demand and the non-payment. Said notes remaining unpaid on the 9th day of November, 1874, the defendant, Charles S. Beardsley, on that day signed and delivered to the plaintiff an instrument in writing, as follows, viz. :

"I agree to give my individual note, payable to Rochester Native Wine Co. (less the amount of liquor barrels sent this month at \$1.75), payable on the first of July next, as collateral to two notes given them by Beardsley & Co., being \$100 each, and indorsed by Henry W. Beardsley. October 9, 1874.

"(Signed) C. S. BEARDSLEY."

The defendant makes two objections to the recovery. First, that the consideration upon which the defendant entered into the collateral agreement is not set forth with sufficient particularity in the complaint. Second, that as the agreement or promise does not purport to be founded upon any consideration it is void within the statute of frauds.

As to the first objection it appears that the complaint avers the collateral agreement to have been executed for value. This averment we deem sufficient—at all events until the plaintiff shall have been ordered to make his complaint more specific. The second objection presents a more serious question.

The statute of frauds, as enacted in the Revised Statutes of 1830, declares every agreement void, unless some note or memorandum *expressing the consideration* be in writing, subscribed by the party to be charged therewith in certain specified cases, among others: "Every special promise to answer for the debt, default or mis-carriage of another person." This provision, though not in the



precise verbiage, was in substance the provision of the Revised Laws of 1813, and of the statute of frauds from the time of Charles II, except that by the revision of 1830, the words "*expressing the consideration*" were inserted. Under the statute, as it existed before the revision of 1830, it had been long held that the "agreement" required by the statute, to be in writing, comprehended the consideration as well as the promise, and that the omission could not be supplied by parol proof of a valid consideration not specified or in some manner indicated by the agreement in writing. (See *Staats v. Howlett*, 4 Denio, 560.) But it was, nevertheless, held that the consideration might be inferred, implied or "spelled out" from the agreement and from other papers referred to in it, and need not be expressly stated as the consideration upon which the agreement was based. In *Packer v. Willson* (15 Wend., 343), Chief Justice SAVAGE delivering the opinion of the court, and speaking of the words added to the statute in the revision of 1830, says: "It was thought by the revisers and the legislature that the most proper way for courts to find out the consideration of an agreement was not to infer or imply or spell out the consideration, but after the passing the Revised Statutes the party should express the consideration," and in that case it was substantially held that the difference made by the addition of the words in question was between the words "express" and "imply," which, in the case then before the court, was said to be "a very material one." From that time down to the passage of the amendatory act of 1863, hereafter referred to, the question whether the addition of the words in question in the revision of 1830 had added any thing to the statute, or had restricted the power and ingenuity of the courts in implying or endeavoring to "spell out" a consideration from the agreement, was a fruitful source of controversy in the courts, leading to contradictory rulings on the subject. (See *Church v. Brown*, 21 N. Y., 315.)

In 1863 the legislature amended this portion of the statute of frauds by re-enacting its provisions, omitting the words "expressing the consideration." (Laws of 1863, ch. 464.)

This amendment, it would appear, left the law to stand precisely as it was, under the interpretation of the courts, before the words requiring the consideration to be expressed were inserted, and thus the law would be relieved from that uncertainty which seemed to

arise out of differences of opinion in regard to the effect of the words which had been inserted in the revision of 1830, and which, for upwards of thirty years, had been the subject of controversy.

The counsel for the plaintiffs, however, contends that by the amendment, the sole apparent effect of which was to omit from the statute the words which required the consideration to be expressed in the agreement, the legislature did not intend to restore the act, as it was understood and construed by the courts before those words were inserted, but intended to make a more sweeping alteration of the law, and, in fact, to overturn or abrogate that doctrine which had for a long time been maintained by the courts, both in England and in this State, that the whole agreement, including not only the promise but the consideration, must in some way appear or be indicated by the writing. And a very elaborate opinion of the Superior Court of New York, delivered by Judge FREEMAN, in *Speyers v. Lambert* (1 Sweeney, 335; S. C., 37 How., 315), is cited as sustaining this position.

It is quite true that the decision in *Speyers v. Lambert* fully sustains the position of the counsel for the plaintiff, and Judge FREEMAN, in the opinion, very strongly argues that by the amendment of 1863, the legislature intended to abolish the necessity of the consideration being in any way stated or indicated by the written agreement. But it will be seen that the argument of the opinion is as to what the law perhaps ought to be, rather than an attempt to show, by any known or recognized rule of interpretation, that the amendment of 1863 was intended by the legislature to have the effect assumed.

We must assume, what we cannot doubt was especially true in this case, that the legislature was familiar with the construction which had been adopted by the courts prior to the revision of 1830, and to the controversies which had grown up after that time, and been continued for a period of thirty years, as to whether the words added in 1830 had really added any thing to the meaning of the statute, or whether the courts were still at liberty to infer and "spell out" the consideration as before the revision of 1830.

The only inference as to the intention of the legislature in the amendment of 1863, which can be safely drawn from the act then passed is, we think, that the legislature intended to restore the

law to what it was well settled to be, before the omitted words which had given rise to controversy and uncertainty had been inserted. This is plainly what the legislature did, and to hold that it intended to simply restore the law to what it was before the omitted words were inserted, but to go further and abrogate the necessity of having that part of the agreement relating to the consideration in writing like the residue, we think is unwarranted by any sound and safe rule in the interpretation of statutes, and would approach the assumption of legislative power by the court. Mr. Bingham, in his work on executory sales of real property, in alluding to the case of *Speyers v. Lambert*, says: "It is certainly a singular way of construing a statute that has once been amended, and then again amended, by striking out the amendment, to mean something different from what it did before it was amended at all." (Bingham on Contracts for Sale of Real Property, 363.) There appears to be great force in the criticism. Though entertaining the highest respect for the court by which the decision thus criticised was made, we are constrained to a different conclusion. In the case at bar, the notes referred to in the agreement had been made and become due, long before the agreement in question was made, and they could not of themselves furnish any consideration for the agreement of the defendant, and indeed his agreement contains nothing by reference or otherwise from which any consideration can be "inferred, implied, or spelled out." It is a mere naked promise to answer for the debt of another, and manifestly void by the statute of frauds, if that statute requires, as we hold it does, that the consideration as well as the promise should appear by agreement in writing.

The judgment is reversed and a new trial ordered, costs to abide the event.

Present — MULLIN, P. J., SMITH and TALCOTT, JJ.

Judgment reversed and new trial ordered, costs to abide the event.

THE PEOPLE EX REL. EDWARD HUGHES *v.* MARGARET LAMB.

*Summary proceeding — sufficiency of affidavit to procure summons — Certificate of service by constable.*

An averment in an affidavit, made in summary proceedings instituted to remove a tenant, that the amount specified is due for the rent of the premises, in pursuance of the agreement by which the premises were "let," in connection with a statement that the defendant holds over and continues in possession of said premises, is substantially equivalent to the statement that the amount is due pursuant to the agreement under which the premises are "held," as required by the statute. The certificate of the constable, showing a service of the summons upon the defendant personally, by showing the original and delivering a copy thereof to him, is "due proof" of the service thereof.

*Robinson v. McManus* (4 Lans., 380) distinguished.

CERTIORARI to review summary proceedings, instituted before a justice of the peace in Syracuse, under the "landlord and tenant act."

The affidavit of the respondent was as follows :

"ONONDAGA COUNTY, }  
CITY OF SYRACUSE, } ss. :

"Margaret Lamb, of Syracuse, in said county, being duly sworn, says, that she is the rightful owner of the premises hereinafter mentioned, and entitled to the possession thereof ; and that Edward Hughes is justly indebted unto said Margaret Lamb in the sum of fifteen dollars due the 1st day of August, 1876, for the rent of a house and premises known as No. 163, on East Washington street, in Syracuse aforesaid ; that she has demanded the said rent from the said Hughes, who has made default in the payment thereof pursuant to the agreement under which said premises were let, and that he holds over and continues in possession of the same without the permission of the landlord, after default as aforesaid.

"MARGARET<sup>her</sup> + LAMB."  
mark.

"Sworn to this 17th day of August, }  
1876, before me, }

"H. WHEATON,

"Justice."

The constable who served the summons returned the same with the following indorsement thereon :

"I certify that on the 17th day of August, 1876, at about twelve o'clock, noon, I served the within summons, personally, on the defendant, in Syracuse, New York, by handing to and leaving with him a true copy thereof, and at the same time showing him the original.

"THOMAS CONWAY,

"August 17, 1876. Fees, 50, paid.

Constable."

*Coats & Belknap*, for the relator.

*A. L. Johnson*, for the defendant.

TALCOTT, J. :

This is a *certiorari*, the return to which brings up summary proceedings before a justice of the peace in Syracuse, under the "landlord and tenant act." Under the twenty-third rule of the Supreme Court this should be heard at the Special Term in the first instance, but we have looked into the case and do not see that any of the objections of the relator to the proceedings before the magistrate are tenable. The affidavit of the landlord is in precise accordance with the form for that purpose prescribed in *Wait's Practice* (5 *Wait's Prac.*, 427), with the addition of the words, probably unnecessary, that she, the landlord, is the rightful owner of the premises and entitled to the possession thereof, and we think sufficiently shows that the conventional relation of landlord and tenant exists between the parties, and the averment that the amount specified is due for the rent of the premises, in pursuance of the agreement by which the premises were "*let*," in connection with the statement, that the defendant holds over and continues in possession thereof, is, we think, substantially equivalent to the statement that the amount is due, pursuant to the agreement under which the premises are "held" as required by the statute. We think due proof of the service of the summons was made by the certified return of the constable. That showed a service upon the defendant personally, by showing the original and delivering a copy.

The case of *Robinson v. McManus* (4 *Lans.*, 380) is only to the effect that the justice was not confined to the return as evidence of

the service, but where that did not show all the particulars of a due service, might examine the constable orally. The officer is required to make return in such a case (2 R. S. [m. p.], 440, § 77), and such return if it shows a good service, is "due proof." The fact that the justice received evidence of the circumstances which authorized the issuing of the warrant, although there was no appearance on behalf of the tenant, though perhaps unnecessary, had no tendency to injure the relator, and does not constitute a proper subject of complaint by him.

The *certiorari* must be dismissed, and the proceedings affirmed with costs to the defendant.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

*Certiorari* dismissed and the proceedings affirmed, with costs to the defendant.

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WILLIAM CANDEE, RESPONDENT, v. S. ANGELINE BURKE  
AND OTHERS, APPELLANTS.

*Res adjudicata — Mesne profits — allegation as to, in complaint — recovery for*

In an action of ejectment the defendants set up in their answer that the premises in question, together with *others*, were conveyed to the plaintiff by their ancestor, Enos Burke, in pursuance of an agreement by which plaintiff was to advance to him \$7,200; that Burke was to occupy and cultivate the same for his own benefit; that upon receipt of the said sum, with interest, plaintiff was to account and reconvey the premises to Burke; that such repayment had been made, and they therefore demanded an accounting and a reconveyance. The plaintiff alleged in his reply and subsequently proved upon the trial, that a prior action had been commenced by the said defendants against the plaintiff, in which they claimed that the plaintiff made an arrangement with Burke, by which he was to advance money to the latter and take a conveyance of the premises in question, with *others*, as security for the repayment thereof; that Burke was to remain in possession; that he, until his death, and thereafter the defendants, had continued so to do; that the full amount due the plaintiff herein had been paid, whereupon they demanded an accounting and reconveyance; that judgment was entered therein in favor of the present plaintiff, holding that the conveyance was an absolute and unconditional deed, and not a mortgage or security for any loan made to Burke, and that the title to the premises was vested absolutely in the plaintiff herein.

Upon the trial of this action, *held*, that the cause of action in the former suit and the defense set up in the answer in this case were in substance the same, and that the judgment in the former action was a bar to the defense set up in the answer herein.

When, in an action of ejectment, it appears from the complaint that the plaintiff claims to recover the value of the rents and profits of the premises during the time they have been unlawfully withheld by the defendant, it is too late, on the trial, to object to the form and want of particularity and certainty with which the allegations relating thereto are made.

APPEAL from a judgment in ejectment in favor of the plaintiff, entered upon the trial of this action at the Circuit.

*J. D. Garfield*, for the appellants.

*Frank Hiscock*, for the respondent.

TALCOTT, J.:

This is an appeal from a judgment rendered at the Onondaga Circuit for the plaintiff, in an action of ejectment. Amongst other special answers made by the defendants, they set up that one Enos Burke, the husband of the defendant S. Angelina Burke, and the father of the other defendants, in his lifetime agreed to convey a part of the premises in question, and to procure a conveyance of the residue, to one Daniel Candee and the plaintiff, "at and for the consideration of something less than \$7,200, the amount stated in said conveyance, to be paid or advanced in part to said Burke, and in part upon liens and incumbrances against said Burke, upon said premises by said Candees. The said Enos Burke, also, by said agreement, was to remain in and retain the possession of said premises, and work and cultivate the same on his own account and for his own benefit as his own property. The said Enos Burke, also, by said agreement, was to place in the hands of said Candees the proceeds of certain other real estate and other property, and the net avails of the products of said premises over and above the support of his family and the expenses of carrying on said farm belonging to said Burke, or in which he had some right or interest, towards the repurchase of said premises, and when the full sum of \$7,200 and the interest thereon had been paid by said Burke to said Candees the said Candees were to reconvey said premises to said Burke, and to settle with him for the moneys placed in their hands towards the repurchase of said premises."

The answer then goes on to allege that the said Enos Burke did, on or about the 1st of August, 1844, convey to said Candees the east half of said premises, and did procure one Hicks Worden, who held the title to the west half thereof, for the benefit of said Burke, to convey the west half to the said Candees, and the said Candees did pay to the said Burke, and upon the liens and incumbrances, the said \$7,200. That Burke, by virtue of the said agreement, did retain possession of the said premises and cultivate the same for his own use and benefit until his death, in 1862, and that the defendants, succeeding to the rights and interest of said Burke, have ever since remained in possession of said premises.

The defendants then allege that from the amounts paid by Burke, and from what the said Candees have received from the net proceeds of the premises, the whole consideration of the \$7,200 and the interest thereon, has been realized by the Candees. That Burke died intestate, leaving the defendants him surviving, and that Daniel Candee died in 1848, leaving a will by which all his rights in the premises were transferred to the plaintiff. That the defendants have demanded of the plaintiff a settlement of the account and a reconveyance, but plaintiff has refused to come to such settlement and to reconvey according to said agreement, and the defendants claim that they are entitled to such accounting, and to a reconveyance. To this answer, the plaintiff replied, a former suit commenced in 1870, in the Supreme Court, by the defendants against the plaintiff, "wherein the same matters were alleged, or might or should have been alleged." That the plaintiff answered in the said former action; that issue was duly joined upon all the matters set out in the pleadings in the said action; that the said Supreme Court had jurisdiction of the parties and the subject-matter of the said action, and the same was duly referred to a referee to hear and determine; that the action was duly tried on the merits and decided on the merits, against the now defendants and in favor of the plaintiff, and judgment was rendered thereon on the merits, and duly perfected in the office of the clerk of Onondaga county, in October, 1872, and the judgment record is referred to as a part of the reply, and notice given that the plaintiff will put the same in evidence on the trial of this cause as a bar to the counter-claim set up by the defendants in this action.



A copy of the judgment record in the former action is contained in the case, and seems to have been attached to the reply. Upon these pleadings, the judgment record in the former action, and the opening of the counsel for the defendant in this case, the principal question decided at the Circuit arose, and after a long discussion by the counsel on both sides, the substance of which is mentioned in the case, the justice at the Circuit held that the cause of action in the former suit, and the defense set up in the answer in this case, replied to as above, were in substance the same, and that the judgment in the said former action was a bar to the defense set up in the answer of the defendants, which is hereinbefore mentioned. It is sufficient to say of the said former action, that it was an action commenced by these defendants against this plaintiff, in which it was alleged by the plaintiffs that in August, 1844, an arrangement was made whereby Daniel and William Candee "were to" assist said Enos Burke, and pay certain mortgages and judgments against said Burke, take the conveyance of a part of the premises from Burke, and the other part to be procured by Burke from one Hicks Worden, as security for the repayment of such advances as they should make to Burke; that Burke was to retain the possession of the premises, and did do so until his death, and that since then the then plaintiffs, now defendants, have continued in possession, and that payments have been made more than sufficient to extinguish the indebtedness; that the defendant, now plaintiff, claims that the said deeds were absolute and not as security, and the complaint asks that the present plaintiff may be adjudged to hold the premises as mortgagee, and asks for an accounting and reconveyance, and that the defendant may be restrained from taking any proceedings to dispossess the now defendants.

Various collateral and incidental circumstances are alleged in the complaint in the former suit, many of which are not repeated or referred to in the answer in this case. The now plaintiff answered in the former suit, claimed that the property was purchased absolutely, and that the deeds to himself and Daniel Candee were absolute and not as security.

The former action was, as appears by the judgment record, tried before the referee, who reported, amongst other things, that each and every of the said conveyances was an absolute and unconditional

deed, and not in the nature of a mortgage or security for any loan made or to be made to or for the benefit of Enos Burke, and that the title to the premises conveyed by the said deeds vested absolutely in the grantees therein named, subject only to the incumbrances mentioned in the said deeds respectively, and that the plaintiffs are not entitled to an accounting, or to redeem and have a conveyance of the premises or any part thereof, and that the now plaintiff was entitled to judgment against the now defendants to that effect, with costs.

On this report a judgment was duly entered on the 8th of October, 1872, and, so far as appears, has been acquiesced in as correct. It is quite manifest from the pleadings in this case, and from the statements of the counsel for the defendants, and his offer of proof that the defendants are seeking in this action to retry the question whether Enos Burke had, by an arrangement or contract with the Candees at or about the time when the conveyances were made to them, reserved a right to redeem the premises in question upon the repayment to the Candees of the amount advanced, and to be advanced by them, and constituting the apparent consideration for the conveyances with interest.

The counsel for the defendants insists that the cause of action set up in the complaint in the former suit, and the defense in this suit are substantially different, inasmuch as the former suit was based upon the theory that the now plaintiff held the premises only as security, and his title was that of a mortgagee, whereas the answer in the present case sets up a contract whereby Enos Burke was to be entitled to redeem, upon the payment of the consideration advanced by the Candees, and that the cause of action set up in the answer by way of defense and counter-claim, is in the nature of a claim for the specific performance of a contract. We see no substantial difference between the allegations on the subject in the former suit and those contained in the answer in this case, except that in the former the matter is called an "arrangement," and in the latter an "agreement." The substance of the allegations in each case was the same, namely, that there was the right of redemption reserved to Enos Burke at the time of the conveyance of the property by deeds absolute in form; and however this was done, whether by express agreement in so many words, or whether the agreement

was to be implied in equity from the fact that the original conveyances were intended as security is not material, and was not material in the former case. The case of *Stowell v. Chamberlain* (60 N. Y., 272) is claimed by the defendant's counsel to be decisive of the case at bar. It appears to us that so far as that case decides any principle relevant to the present case, it maintains the conclusion at which the justice at the Circuit arrived. In that case the former suit had been disposed of on a demurrer. The first action had been in trover for certain bonds, and the demurrer, so far as could be seen, had been sustained on the ground that the present right of the plaintiff to a return of the same bonds did not appear. The action reported in 60 New York, was an action on contract to recover the value of the bonds which the complaint alleged had been received and sold by the defendants, as the agents of the plaintiff. The principle decided as stated in the syllabus of the case is, that "in order to make a former action a bar, the circumstances must be such that the plaintiff might have recovered in the first action for the same cause of action alleged in the second."

Applying that rule to this case, why is not the judgment in the former action a bar? It will scarcely be claimed that the plaintiff could not have recovered in the former action upon proof of the allegations contained in the plea in this case. The former action was in substance to establish in Enos Burke and those who represent him in estate, a right to redeem the premises in question upon repayment to the Candees, or their representatives, of the amount of the consideration paid by the latter for the conveyances, and that right, as claimed by the now defendants, was based upon an asserted contract, either expressed or implied, in equity, at the time of the conveyances. It seems to us plain that the cause of action in the former suit, was substantially identical with the matters set up by way of defense in this suit, and having been once adjudicated upon, is put at rest as between these parties and those who represent them.

In *Fullerton v. McCurdy* (55 N. Y., 637), where an action was commenced to redeem, upon the ground that the title of the defendant was that of a mere mortgagee, and that the mortgage was void for usury, it was claimed that judgment ought to have been rendered for the plaintiff as for a specific performance of a contract of

sale. It is sufficient to say of that case, that among other reasons given by the court for denying that species of relief, it is said that the necessary parties for such a suit are not before the court, and the facts found are not sufficient to show a right in the plaintiff to specific performance. "The findings show that the agreement to convey was verbal, and there is no finding that there was any part performance." The question as to the validity of the foreclosure of the Remington mortgage, and the various exceptions to the admission of evidence founded on the alleged invalidity of that foreclosure as against S. Angelina Burke, the widow, seem to have been presented to the General Term of this department when the case was here before (4 Sup. Ct. Rep. [T. & C.], 143), and it seems to have been then held that the foreclosure was sufficient. The rights of Mary Burke seem to have been protected on this last trial by the stipulation by which the plaintiff omitted to take a judgment for her undivided one-third of one-seventh, that is, one-twenty-first part, of the parcel in which she claimed such separate interest.

The objections to the proof of the loss of the original petition of Enos Burke for the benefit of the insolvent law, if available under any circumstances, seem to be superseded by the ultimate ruling that the former judgment was a bar to the defense attempted under the twelfth answer. The proceedings under the insolvent law were only important as showing that at the time, Enos Burke did not claim to be in any manner interested in the premises which had been conveyed to the Candees, either legally or equitably, and the ruling in question rendered the papers and proceedings of Burke under the insolvent law wholly immaterial.

After the disposition of the issues concerning the title and right to possession, the judge reserved the question of damages for withholding the property and *mesne profits* to be determined before himself at a future day, and there is no point made upon the argument of this appeal against this practice, and although the case contains a statement that the defendants asked to go to the jury on the question of *mesne profits*, it seems to have been afterwards agreed by a stipulation, oral or otherwise, referred to by the justice in the course of the conversation, that it should be disposed of by the court. At all events it is not claimed on this appeal that there

was any error in not referring any question on that subject to the jury.

Afterwards the case came on to be heard on the reserved questions, in regard to a recovery for *mesne profits* in the action. The complaint claims that the plaintiff is entitled to the *mesne profits* of the premises since the same have been withheld by the defendants, and that the fair annual value thereof is the sum of \$2,000, and demands judgment for the premises, and for the rents and profits thereof, during the time they have been withheld by the defendants. When the question as to *mesne profits* came to be tried, the counsel for the defendants claimed that the plaintiff was not entitled to recover any thing therefor in this action, upon the ground, as we understand his position, that what was said in the complaint did not amount to a sufficient count for the recovery of *mesne profits*, not but that the claim for *mesne profits* might be joined in the same action with a claim to recover the land, but that it must be set up in a separate count of the complaint. The defendants were fairly apprised by the complaint, that the plaintiff claimed to recover in the action the value of the rents and profits of the premises during the time they had been unlawfully withheld by the defendants, and we think it was too late on the trial to make any objection to the form and want of particularity and certainty with which the allegations in that behalf were made. (*Holmes v. Davis*, 19 N. Y., 488-493; *Vandevoort v. Gould*, 36 id., 639.) The case of *Larned v. Hudson* (57 id., 151), merely decides that a claim of damages for withholding possession is a different thing from a claim to recover *mesne profits*, and that under a mere claim of damages for withholding possession *mesne profits* cannot be recovered. In this case there is no claim for damages for withholding, but a claim in the complaint for *mesne profits* alone. Although from one portion of the opinion of the justice who tried the cause it would seem that he held that the plaintiff was not entitled to recover the *mesne profits*, but was entitled to recover damages for the unlawful withholding, yet it appears from a subsequent part of the opinion that the damages which he did actually assess, were composed of the annual value of the use of the premises or the rents, issues and profits. This we think was the correct result, upon whatever theory it was arrived at. We think, also, that the court was correct in holding that the right

to recover the *mesne profits* was from the time at least when the defendants denied the title of the plaintiff and assumed a hostile position, by claiming possession in their own right.

The judgment is affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed.

LEVANTIA S. CARPENTER, RESPONDENT, v. ZARAH H. BLAKE, APPELLANT.

*Malpractice — what skill required of a surgeon — Testimony of witness as to general reputation — what questions may be put to.*

One who offers himself for employment in a professional capacity undertakes,

- (1) That he possesses that reasonable degree of learning and skill which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community, and by those conversant with the employment, as necessary to qualify him to engage in such business;
- (2) That he will use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge, to accomplish the purpose for which he is employed;
- (3) That he will use his best judgment in the exertion of his skill and the application of his diligence.

Although, usually when general reputation is relied upon, it is not competent to give in evidence specific acts, either to sustain or to overthrow such general reputation, yet when testimony as to general reputation is given by a witness, he may be asked upon his cross-examination, with a view to lessen the effect of his testimony as to general reputation, or to show a bias in favor of the party who has called him, but not for the purpose of establishing the fact to be proved, whether he has not heard reports which tend to contradict the purport and effect of his testimony.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial made upon a case and exceptions.

*H. R. Selden*, for the appellant.

*S. Hubbard*, for the respondent.

TALOOTT, J.:

Appeal from judgment rendered on a verdict at Livingston Circuit, and from an order of the Special Term denying a motion for a new trial on case and exceptions.

The action is against a physician and surgeon for negligence in the treatment of a dislocation of the elbow of the plaintiff. The case has been several times tried, and has been once to the Court of Appeals. On that occasion, the majority of that court laid down the rule as applicable to actions for negligence in a professional employment, that one who offers himself for employment in a professional capacity undertakes, first, that he possesses that reasonable degree of learning and skill which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community, and by those conversant with the employment, as necessary to qualify him to engage in such business; second, that he will use reasonable and ordinary care and diligence in the exercise of his skill, and the application of his knowledge to accomplish the purpose for which he is employed; third, to use his best judgment in the exertion of his skill and the application of his diligence, and the court reversed a former judgment in this case, for the reason that the General Term had held that, although it was proved that the defendant had the reputation of being sufficiently skilled, the fact was immaterial in the case. (50 N. Y., 696, and see opinion, Judge ALLEN, MS.)

The case, in the Court of Appeals, appears to have been decided principally upon the authority and reasoning of the opinion in *Leighton v. Sargent* (7 Foster [N. H.], 460).

On the last trial of this action, the defendant, besides giving in evidence the opinions of numerous other surgeons as to the propriety of his practice in this case, as described by him and others, also gave in evidence the opinions of other members of his profession who were acquainted with him and his reputation in his profession, that he was reputed to be a skillful physician and surgeon. On the cross-examination of one of these witnesses (Dr. Joshua B. Purchase), it was allowed, against the objection and exception of the defendant, to be proved that the witness had heard from some third party, that on a former occasion and in an operation in which the witness had also heard that the defendant assisted as a surgeon

in a case of a fracture of the leg, that the limb was "set" at a place where it was not broken.

The general rule is, that where general reputation is relied upon, it is not competent to give in evidence specific acts, either to sustain or to overthrow such general reputation. (*Bakeman v. Rose*, 14 Wend., 110, 111; *Corning v. Corning*, 6 N. Y., 104; 2 Phil. Ev. [C. & H.], 291; 1 C. & H. Notes, 764, 766.) The defendant cannot be supposed to be prepared to prove the facts in regard to all cases which had theretofore occurred in his practice, and the inevitable effect of allowing such evidence, would be to introduce before the jury a multitude of collateral issues, and thus tend to obscure and distract attention from the real issue in the case on trial. But when testimony as to general reputation is given by a witness, it seems to be agreed that on his cross-examination, and with a view to lessen the effect of his testimony as to general repute, or to show a bias in favor of the party who has called him, but not for the purpose of establishing the fact to be proved, the witness may be asked whether he has not heard reports which tend to contradict the purport and effect of his testimony. (*Leonard v. Allen*, 11 Cush., 241; *Rea v. Martin*, 6 C. & P., 562.) It is quite clear that the reports referred to in this case, being improbable in themselves and doubtless arising from irresponsible neighborhood gossip, may have justly produced no effect on the mind of the witness, himself a professional man; but since the reputation which it is permissible to prove is a reputation not only among the associates in the profession of the party whose reputation is the subject of examination, but his reputation in the community for skill in his profession, we do not see why the question was not admissible on cross-examination, and the effect of the answer to be judged of by the jury. The charge delivered by the court was, on the whole, we think, quite careful and quite as favorable to the defendant as he had a right to ask. But, after the conclusion of the charge, various legal propositions were stated to the judge by each party, in the form of requests to charge, only one of which calls for any remark, namely, the request to charge that if the plaintiff, or the surgeon who attended her after the defendant had ceased to have charge of the case, was guilty of any negligence in the management of the arm, which in any degree contributed to pro-



FOURTH DEPARTMENT, APRIL TERM, 1877.

duce its crippled condition, that the defendant was not responsible therefor. To this request, the judge declined to charge, except as he had already charged. On a careful examination of the charge, as stated in the case, we do not discover that he had given to the jury any precise instructions upon the legal effect of concurring negligence. There was some evidence that soon after the defendant had ceased to have charge of the case, it was obvious, even to an unprofessional observer, that the bones of the elbow were then out of place, and whether resulting from an original omission on the part of the defendant to place the bones in proper position, or from subsequent and accidental luxation, was one of the questions of fact disputed on the trial. If the luxation had been properly reduced by the defendant, and the bones subsequently got out of place, it was doubtless incumbent upon the plaintiff, or her attending surgeon, to have taken such measures as were reasonably within their power, seasonably to have remedied the difficulty; but the charge, as delivered, contained the instruction: "If you find that the doctor (the defendant) was dismissed with her assent, she has no right to hold him responsible for any subsequent results to that arm." We do not see that there was any reasonable doubt but that the defendant relinquished the further charge of the case, with the entire knowledge and concurrence of the plaintiff, and that being so, the instruction quoted was as favorable to the defendant as the one prayed for. It was an instruction that the defendant was not liable for any subsequent consequences, whether resulting from negligence or otherwise, and in effect, rendered the request unnecessary.

The very elaborate opinion, delivered by the presiding justice when the case was here before,\* and which was not overruled by the majority of the Court of Appeals except upon the single point of the charge, that the question whether the defendant had the requisite skill in his profession was immaterial, renders a more lengthy discussion of the principles applicable to the case unnecessary.

Judgment and order denying a new trial affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed.

\* 60 Barb., 488. — [REP. .

HENRY J. WOOD, RESPONDENT, v. LUCIEN L. HAZEN,  
APPELLANT.

*Bankrupt — application for discharge — within what time it must be made — sec. 29 of bankrupt act.*

Under section 29 of the original bankrupt act, providing that "at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts," *held*, that the requirement that the application should be made within one year from the adjudication of bankruptcy, applied only to those cases in which no debts were proved, or no assets had come to the hands of the assignee.

*In re Greenfield* (2 N. B. R., 311) followed.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

*F. M. Burdick*, for the appellant.

*C. B. Adams*, for the respondent.

TALCOTT, J. :

This is an appeal from a judgment rendered at the Oneida Circuit on a trial before one of the justices of this court without a jury. The action was commenced on the 18th day of October, 1875, and was to recover for goods sold and delivered by the plaintiff to the defendant in May, June and July, in the year 1872. The defendant was duly adjudicated a bankrupt by the District Court of the United States for the northern district of New York, in September, 1872. An assignee in bankruptcy was duly appointed who took possession of the property of the defendant under the bankrupt law. He has made one dividend, but has not yet rendered his final account, and there are funds remaining in his hands undistributed out of which there may be a further dividend. The plaintiff duly proved the claim for which this action is brought, in the proceedings in bankruptcy in November, 1872, and received his dividend. The defendant has never applied for a discharge under the bankrupt act, and such discharge has not been specifically refused to him. He sets up

the proceedings in bankruptcy in his answer, and the fact that the plaintiff proved his claim for which this suit is brought, under those proceedings, and alleges that the proceedings in bankruptcy are still pending and undetermined in the District Court. The action, it will be seen, was commenced more than three years subsequent to the adjudication of bankruptcy, and the question is, whether under the foregoing state of facts, it can be maintained by a creditor who has proved his debt under the proceedings in bankruptcy.

The provision of the bankrupt law bearing on this question, in force when this action was commenced and tried, is as follows:

"No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced, or unsatisfied judgments already obtained against the bankrupt shall be deemed to be discharged and surrendered thereby. But a creditor proving his debt or claim, shall not be held to have waived his right of action or suit against the bankrupt, *where the discharge has been refused or the proceedings have been determined without a discharge.*" (U. S. Revised Statutes, § 5105, as amended by the act of June 22, 1874; 18 U. S. Stat. at Large, 179, § 7.)

A discharge has not been refused to the defendant within the meaning of the act, and the question is, have the proceedings been determined without a discharge? The plaintiff insists that the "proceedings" referred to in the act relate only to proceedings touching or affecting the discharge of the bankrupt, and that although the proceedings relating to the collection and distribution of the property of the debtor amongst his creditors may be still pending and undetermined in the District Court, if the time has elapsed within which the court can grant a discharge, the proceedings are determined within the meaning of the act, so that the right of action of the creditor is revived. Conceding this to be the true construction of the act, it becomes necessary to examine another section, which is section 29 of the bankrupt act, as originally passed, being section 5108 of the Revised Statutes of the United States. It is as follows:

"At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at

any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts."

Whether, under this last section, a discharge can be granted by the court after the lapse of one year from the adjudication of bankruptcy, has been the subject of apparently conflicting decisions in the Courts of the United States. It was held (*In re Greenfield*, 2 N. B. R., 311) by Judges BLATCHFORD and NELSON, in the United States Circuit for the southern district of New York, that by the construction of the said original section 29, the limitation of one year as the extent of the time within which the court had power to grant a discharge applied only to those cases where no debts had been proved, or no assets had come to the hands of the assignee, and where, therefore, the bankrupt might apply for a discharge after the expiration of sixty days from the adjudication of bankruptcy. (See, also, *In re Martin*, 2 N. B. R., 548.) On the other hand (*In re Sloan*, 12 N. B. R., 59), Judge WALLACE, in the District Court, argues that the year's limitation applies to all cases, but in the case then before him, it appeared that no assets had come to the hands of the assignee, so that his remarks *arguendo* must be understood to be *obiter*. It appears that the case of Sloan was taken up to the Circuit Court for the northern district of New York, and we have been favored by the plaintiff, in his points in this case, with the opinion delivered at the Circuit by Judge HUNT, the successor of Mr. Justice NELSON, on the bench of the Supreme Court of the United States. The opinion is quite brief. The learned judge, in affirming the decision of the District Court, denying Sloan a discharge, says, speaking of the year's limitation in section 29: "In my judgment, this applies to all cases, whether there are debts proved or assets received or not." It will be perceived, however, that Judge HUNT does not profess to directly overrule the previous decision of Judge NELSON, but says only, in alluding to it: "If it be assumed that the distinction made by Judge NELSON, that the limitation of one year applies only to cases where there are no assets or no debts are proven, is a sound one, the result here must be the same;" thus expressly recognizing the fact that the question whether the year's limitation, applied to cases where debts had been proven and assets had come to the hands of the assignee, was not before him. As to some extent

strengthening the position of the defendant here, it may be remarked that the decision of Judge NELSON was made soon after the bankrupt law went into effect, and when its operation, under the decision of the courts, was watched with much interest by the profession, and presumably by members of the national legislature, and the construction which had been put upon the twenty-ninth section by so eminent and experienced a judge as Mr. Justice NELSON, on a point so important, doubtless attracted attention, yet, while congress has from time to time amended and remodeled the bankrupt law, it has left the original section 29, standing unchanged, until, by an act approved July 26, 1876 (Acts of Forty-fourth Congress, chap. 234), the twenty-ninth original section, now section 5108, is amended by striking out the limitation altogether, and providing that "at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may apply to the court for a discharge from his debts;" and further providing that the section, as thus amended, shall apply to all cases, whether commenced before or after the amendment.

In this state of the decisions of the courts of the United States and of the legislation, we think the proper course for this court is to hold that the decision of Mr. Justice NELSON is the true construction of the original twenty-ninth section, until that decision shall have been directly overruled, which, as we have seen, it was not in the case of Sloan. Such being the case, it appears that the time within which the United States District Court may grant a discharge to the defendant had not expired when the action was commenced, and consequently that the proceedings mentioned in section 5105, have not terminated, and that the plaintiff's right of action was suspended by that section when this action was commenced. This leads, of course, to a reversal of the judgment.

Judgment reversed and new trial ordered, costs to abide the event.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment reversed and new trial ordered, costs to abide the event.

CATHARINE CURRY, APPELLANT, v. ROBERT CURRY,  
RESPONDENT.

SAME v. JOHN CURRY, RESPONDENT.

*Ante-nuptial agreement — release of dower by wife — consideration required to sustain it — chap. 375 of 1849.*

An ante-nuptial contract of a woman that she will not claim her dower in the event of her intended marriage is contrary to public policy, and unless founded upon the consideration of some provision for her in lieu of dower, will be ineffectual both at law and in equity.

This rule is not changed by chapter 375 of 1849, providing that all contracts made between persons in contemplation of marriage, shall remain in full force after such marriage takes place.

Such intended marriage, even though solemnized in reliance upon the agreement, does not of itself furnish a sufficient consideration to support the same.

*Quere*, as to the power of the court to inquire into the adequacy of the provision made for the wife, and as to the extent to which such inquiry can be carried.

APPEALS from judgments in favor of the defendant in the above entitled actions entered upon the reports of a referee.

*James B. Perkins*, for the appellant.

*J. A. Stull*, for the respondent. The agreement was founded upon, and recited a sufficient consideration, viz. : an intended marriage between the parties, and one dollar. The marriage was a valid and sufficient consideration for the contract. (2 Kent's Com. [12th ed.], 172, 173; 1 Bishop on Law of Married Woman, §§ 26, 27, 28, 775, 776, and cases cited; Tyler on Inf. and Cov., 454, § 324; *Strong v. Arden*, 1 Johns. Ch., 271; 2 Story's Eq. Jur., § 986.) The fairness and reasonableness of such a contract now furnishes a test by which its validity is sustained in a court of equity. (1 Bishop on Law of Married Women, § 424.) And such an agreement will also be sustained in a court of law. (1 Bishop on Law of Married Women, §§ 424, 427, and cases cited; 1 Bishop on Mar. and Div., §§ 14, 15; *Miller v. Goodwin*, 8 Gray, 542; *Stilley v. Folyer*, 14 Ohio R., 610; *Selleck v. Selleck*, 8 Cowan, 79, 85;

*Charles v. Charles*, 8 Gratt., 486; *Neves v. Scott*, 9 How. [U. S.], 196; *Withers v. Weaver*, 10 Barr., 391; *Vance v. Vance*, 21 Me., 364; Scribner on Dower, 388.)

TALCOTT, J.:

These cases are appeals from judgments rendered for the defendants on the reports of a referee.

The action in each case is ejectment for dower. The answers are the same in each case, the evidence was the same, and the referee's report the same. The two cases were argued as one.

The plaintiff, as the widow of Robert J. Curry, sues in each case to recover her dower in a farm, situate in Monroe county. The two farms were, by the deceased Robert J. Curry, devised to his two sons, one to Robert and the other to John. The referee finds in each case that Robert J. Curry was seized of the premises at his death, but has reported in favor of the defendant in each case, giving effect to an ante-nuptial agreement between the plaintiff and Robert J. Curry, her deceased husband, as an equitable bar to her claim of dower in the two farms. The ante-nuptial agreement relied on, was duly executed and acknowledged between the parties on the day of their marriage, in July, 1864. The agreement is short and in substance recites that the plaintiff (then Catharine Barry), in consideration of a marriage about to be had and solemnized between her and the said Robert J. Curry, and in consideration of the sum of one dollar to her in hand paid, "doth hereby covenant and agree with the said Robert J. Curry that the said Robert J. Curry, his heirs and assigns, shall and will forever hereafter stand seized of and sole owner to the said two farms, to the use of said Robert J. Curry his heirs and assigns, free from all claims of dower or interest therein of the said Catharine, both before and after the decease of the said Robert J. Curry." And it is further stated in the said agreement, that it was thereby intended that the said agreement should operate as a release and discharge of all claims for dower which the said Catharine might acquire by virtue of her marriage with the said Robert J., and that the said two farms should be, and the same were thereby discharged of and freed from all claims which the said Catharine might have or acquire by such marriage. And, it was further provided, that the said agreement was not to affect or

impair the claim of the said Catharine by virtue of said marriage in any other real or personal estate of the said Robert J.

The instrument was executed under seal by both parties, Catharine Barry and Robert J. Curry, and was duly acknowledged by them. The marriage referred to in the agreement was duly solemnized within about one hour after the execution of the agreement, and as the referee finds, "in reliance upon it, and in the belief that by its provisions the two parcels of land there described were free and clear from all claim for dower or other interest therein, to which the plaintiff would otherwise be entitled by said marriage."

There was no actual consideration paid or given to the plaintiff as the consideration for signing the said agreement.

The parties lived together in wedlock until in the month of January, 1875, when Robert J. Curry died seized of the two farms in question, and of several other parcels of real estate, and the owner of a considerable personal property. An ante-nuptial contract of a female that she will not claim her dower in the event of her intended marriage, is contrary to public policy, and unless founded upon the consideration of some provision for her in lieu of dower, will be ineffectual both at law and in equity. (4 Kent Com., 56 [Ed. note, B]); *Power v. Shiel*, 1 Mallory, 296; *Miller v. Folger*, 14 Ohio, 610; *Gould v. Vomack*, 2 Ala., 83.)

At the common law, dower could be barred only by settling for the benefit of the wife, some adequate provision for her during widowhood; whether the court could inquire into the adequacy of the provision, and to what extent, has been the subject of some difference of opinion. In the case of *Andrews v. Andrews* (8 Conn., 85), cited by the learned referee, it was held that any provision which an adult before marriage agrees to accept in lieu of dower, will be a good equitable jointure. In that case, the provision was that the husband would forego his marital rights in reference to the property of the wife, both real and personal, said by the court to have been large, and also, to a certain extent, in the proceeds of her labor; and, as said by the court, except for the agreement, the husband would, by virtue of the marriage, have been entitled to the personal property and the use of the real estate during their joint lives; and though marriage is said in the opinion to be a valuable consideration, it is not intimated that the marriage



alone would be a sufficient consideration to sustain such a contract. The contract was upheld on the ground that the intended husband relinquished valuable marital rights, and had performed the agreement on his part. (See *McCartee v. Teller*, 2 Paige, 511.) But in no case to which we have been referred has it been held that an agreement made before marriage, and without any consideration except the intended marriage, not to claim dower to which the female would otherwise be entitled, in consequence of the marriage, can be upheld or would be enforced in equity.

The legislation on this subject seems to throw some light upon the views which the legislature has taken in regard to the validity and effect of such a contract.

The Revised Statutes provide (1 R. S., 741, § 9), that "whenever an estate in lands shall be conveyed to a person and his intended wife, or to such intended wife alone, or to any person in trust for such person and his intended wife, or in trust for such wife alone, for the purpose of creating a jointure for such intended wife, and with her assent, such jointure shall be a bar to any right or claim of dower of such wife, in any lands of the husband." And again, in section 11, that "any pecuniary provision that shall be made for the benefit of an intended wife, and in lieu of dower, shall, if assented to by such intended wife, as above provided, be a bar to any right or claim of dower of such wife in all the lands of her husband."

It is manifest from these statutes that the legislature did not intend that any contract made by an intended wife, or with her assent, which did not contain some provision for her by the settlement of lands or by a pecuniary provision, should operate to bar dower.

It is not necessary in this case to decide whether, under the statute referred to, the court can inquire into the adequacy of the provision, or whether it is to be confined to a provision taking effect for the benefit of the wife on the death of the husband, or whether such provision as prescribed by the statute being made, it constitutes a legal or only an equitable bar. It is sufficient to say that the legislature understood and recognized the rule of both law and equity, that an ante-nuptial agreement not founded on any consideration save the contemplated marriage would be ineffectual to bar the dower of the female contemplating marriage. In 1849, the legisla-

ture enacted as follows: "All contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place." (Laws of 1849, chap. 375, § 3.)

This provision of the statute was not intended to change the law requiring a consideration for a contract not to claim dower, but apparently only to change that rule of law which avoided contracts between parties intending marriage by the marriage itself, so that now an ante-nuptial agreement solely between the parties contemplating marriage could be enforced after and notwithstanding the marriage. Such construction has recently been given to this section by this General Term in *Brown v. Conger, Executor, etc.*, where it was held that this section did not repeal or alter that portion of the statute of frauds which requires such contracts to be in writing.

The learned referee finds a consideration for the agreement in the marriage itself. It is true that marriage itself is a valuable and sufficient consideration to sustain many contracts, and may in part sustain an ante-nuptial contract to forego dower, but, as before said, it seems to be settled that it is not of itself a sufficient consideration upon which to base an agreement to relinquish one of the most important rights which the law attaches to the marriage itself. The referee also finds a consideration in what he considers the implied covenant of the decedent to do nothing to affect or impair the claim of the plaintiff to dower in all his real estate but the excepted parcels.

The provision alluded to is the closing one, that this "agreement however not to affect the claim of said Catharine by virtue of such marriage in any other real or personal estate of the said Robert J." This provision, it seems to us, is mere surplusage. The agreement could not, without it, and did not purport to, affect her claim to any other property. It would be a novel rule that an agreement requiring a consideration for its support is to be maintained upon the ground that because it was not to affect any other rights than those specified in it, that this circumstance of itself, whether resulting from the construction of the contract, or specially provided for in it, furnished a sufficient consideration. We do not see, although the instrument was executed by Curry, how any covenant could be implied against him, extending beyond the provision itself, to wit, that the *agreement* should not operate beyond its terms, and such a covenant, even if expressed, would be of no effect.

It is urged that modern legislation, by which many new powers in respect to property, its acquisition and holding by a married woman free from the control of the husband, has removed many of the reasons why dower was so much favored, and that the rules of law, long established for the protection of dower rights, might well be abrogated, or at least much ameliorated. Such considerations are very proper if addressed to the legislature, but courts can scarcely venture in advance of the legislature to undertake to change the settled law upon the subject. What was formerly a good consideration to uphold an ante-nuptial agreement not to claim dower, is now secured by law to married women, and therefore the rule requiring a consideration other than the intended marriage to support such a contract, is no longer just or equitable. So long as the right of dower is maintained, the courts have no power to alter the conditions on which only it can be barred, till the legislature speaks.

The advantages to be obtained by the marriage, as contrasted with the situation of the plaintiff when the ante-nuptial agreement was made, though as suggested by the referee, such, as that "a judicious friend in view of all circumstances would have advised," the making of the agreement by her, would probably tend greatly to show that the agreement could not be held void simply as unfair, and the result of fraud or imposition, but they cannot have the effect of abrogating the rule that such an agreement must be founded upon at least some valid consideration besides the marriage and the legal claims of the wife growing out of it. It appears that the husband, by his last will, made a certain provision for the plaintiff in lieu of dower, and it was claimed on the trial that the plaintiff had elected to accept such provisions of the will in lieu of her dower. The referee, however, has found as a matter of fact, that the evidence on that subject was insufficient to sustain the allegation that she had made any such election. We are now asked to sustain the report of the referee, upon the ground that his finding of the fact that the evidence was insufficient to show such an election as would bar the plaintiff, was erroneous. We think this cannot justly be done. The defendant has not appealed from the decision of the referee. The plaintiff was not called upon to insert in the case the evidence bearing upon the question, and we cannot be sure that the case, as presented, sets forth all the evidence which was

given, or which might have been given on the subject. Being of the opinion that the learned referee has fallen into an error as to the validity and effect of the ante-nuptial agreement, on which alone he has based his decision that the plaintiff's claim for dower is barred, we are compelled to reverse the judgment.

Judgment reversed and new trial ordered, costs to abide the event.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment reversed in each case and new trial ordered, costs to abide event

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CHARLES W. MILES, APPELLANT, v. FRANCIS A. LOOMIS,  
EXECUTOR, AND SARAH J. MILES, AS EXECUTRIX OF JAMES  
M. MILES, DECEASED, RESPONDENTS.

*Forgery — experts — opinion of, as to signature being simulated — comparison of  
handwritings.*

Where, in an action upon a promissory note, the defense of forgery is interposed, experts, as to handwriting, may be permitted to give their opinion from a comparison of the disputed signature with other genuine writings in evidence in the case, and to state, from an examination of the genuine writings and the disputed signature, whether the latter appears to be simulated.

APPEAL from a judgment in favor of the defendants entered upon the report of a referee.

The plaintiff brought his action on a promissory note of \$2,300, claimed by plaintiff to have been made by the deceased, James M. Miles.

The note was put in evidence by plaintiff, and the defendants produced and put in evidence a note, made by the plaintiff to the defendant bearing the same date as the note sued upon, the body of which was proved to be the genuine handwriting of James M. Miles, deceased; and also the last will and testament of said James M. Miles.

Witnesses were called and sworn on both sides, who had more or less acquaintance with the handwriting of James M. Miles, and testified as to their opinion of the genuineness of the signature to said note.

On the trial the defendants called and had sworn Truesdell, Barnes and Cowie, as experts on the question of the genuineness of the said signature, and before each of them were placed the note in suit, the note put in evidence by defendants aforesaid, the body of which is in the handwriting of James M. Miles, deceased, and the said will and testament of James M. Miles; and each of said experts were told to look at the signature of the note in suit, and then to examine the body of the said note in the handwriting of James M. Miles, and the signature to the said will; and then, assuming the body of said note and the signature to said will to be the genuine handwriting of said James M. Miles, to give their opinion as to the genuineness of the signature to the note in suit.

The question was duly objected to and the objection overruled, and each witness answered in substance that, in his opinion, it was a forged signature.

To the ruling of the referee the plaintiff's counsel excepted.

One of said experts was asked whether, in his opinion, the signature to the note in suit was a simulated signature; and the others, whether it was a simulated signature or an effort to imitate the handwriting of some other person, and under the objection of plaintiff's counsel were allowed to answer that it was, in their opinion, a simulated signature or an attempt at imitation; and plaintiff's counsel duly excepted to the ruling of said referee and the admission of said evidence.

*W. P. Goodelle* and *Frank Hiscock*, for the appellant. The referee erred in allowing a comparison of handwriting; the opinion of the witnesses was wholly upon such comparison, they having no previous knowledge of the handwriting of James M. Miles. (*Ellis v. People*, 21 How., 356; *People v. Spooner*, 1 Den., 343, and authorities there cited; *Phoenix Fire Ins. Co. v. Philip*, 13 Wend., 81; *Boyle v. Coleman*, 13 Barb., 42.) The admission of the testimony was usurping the province of the court or jury, to which alone it was competent to submit the signatures for comparison, if they were properly in evidence. (See cases above cited; also, *Ellis v. People*, 21 How., 356; *Dubois v. Baker*, 30 N. Y., 355; *Van Wyck v. McIntosh*, 14 id., 439; *Johnson v. Hicks*, 1 Lans., 150; *Randolph v. Loughlin*, 48 N. Y., 456; *Perry v. Newton*, 5 A. & E., 544.) As

to the opinion of the experts that the signature to the note in suit is a simulated signature, or was an effort to imitate the handwriting of some other person, we submit that the court erred. (*Johnson v. Hicks*, 1 Lans., 150; *People v. Spooner*, 1 Den., 343; *Kowing v. Manley*, 49 N. Y., 192.)

*Wm. C. Ruger*, for the respondents.

TALCOTT, J. :

This is an appeal from a judgment for the defendant entered on the report of a referee. The action is upon a promissory note, claimed to have been made and delivered by the testator to the plaintiff, and payable at the death of the testator. The plaintiff claims that the note was, in fact, made by the testator that it might be used as an offset to a note, which he at the same time executed to the testator, and at his earnest solicitation, for an amount which he did not justly owe, but which the testator desired to get from the plaintiff, in order to satisfy his wife and her father, but which he, the testator, did not intend should be paid by the plaintiff, but which note had, after the death of the testator, been transferred for a valuable consideration before maturity, so that the plaintiff was liable thereon to a *bona fide* holder. The defense was, forgery of the note in suit.

The referee has found that the note is a forgery, and the only questions presented arises upon the admission of the testimony of certain witnesses called as experts to establish the forgery.

The note given by the plaintiff to James M. Miles, the deceased, was given in evidence on the trial without objection, and it was properly in evidence in the case, because it was set up as a counterclaim, and because being dated on the same day as the note in suit, and for nearly the same amount, it was improbable without explanation, at all events, that the note in suit was made by the testator when the note admitted to be genuine was made by the plaintiff to the testator on the same day. The will of the testator was also put in evidence by the defendants, for what particular purpose we cannot see from the case, since it does not appear that any question arose on any provision of the will which was alleged in the complaint and admitted in the answer. At all events, it was received

## FOURTH DEPARTMENT. APRIL TERM, 1877.

in evidence without objection, and as the case does not contain the evidence, we must presume the will to have been pertinent for some legitimate purpose, aside from a mere comparison of handwriting. These two papers were afterwards used and referred to by the witnesses who testified as experts in reference to the signature to the note in suit.

The papers being thus in evidence in this case, presumably for some legitimate purpose, they might undoubtedly be used by the referee, examined, scrutinized, compared and remarked upon by counsel as bearing on the question whether the note in suit was signed by the testator, but the question is, whether witnesses could testify as experts, from a comparison of the several signatures? On this subject it must be admitted that the reported decisions in this State do not show the law to be in a very satisfactory and settled condition.

In 1823, the late Chancellor WALWORTH, then being a Circuit judge, held, at the Saratoga Oyer and Terminer, on the trial of an indictment for forgery, that the testimony of experts from a comparison of hands, was admissible. (*People v. Hewitt*, 2 Parker, 20.) But, in 1845, in *The People v. Spooner* (1 Denio, 343), the Supreme Court held it to be well settled that such evidence is not admissible. In the *Phoenix Fire Insurance Company v. Philip* (13 Wend., 81), SAVAGE, C. J., says: "Witnesses skilled in handwriting have been received to prove whether, in their opinion, certain instruments were written in a natural or imitated character, and, of course, whether they were genuine or forged. This species of evidence differs very little from comparison of handwriting, which is inadmissible. The comparison of hands which is inadmissible, is that arising from the juxtaposition of two writings in order to ascertain whether both were written by the same person, and this is not admitted." The thing in that case sought to be established was whether certain accounts of stock, all written by the plaintiff, but purporting to have been written in different years, were, in fact, written at the same time, and such evidence was held to be inadmissible, the court saying: "The opinion of the witnesses were worth no more than the individual opinions of the jurors themselves."

In *Ellis v. The People* (21 How. Pr., 356), Mr. Justice ALLEN, delivering the opinion of the New York General Term, held, as we

understand it, that the testimony of an expert on this subject is incompetent, saying a witness cannot take the place and usurp the functions of the jury.

In *Van Wyck v. McIntosh* (14 N. Y., 439), where notes were offered in evidence, solely for the purpose of a comparison, it was held that "our courts have adopted the English rule, which excludes such comparisons by the jury as evidence to prove or disprove the handwriting of a party, and the opinions of witnesses founded thereon." (See opinions of F. A. JOHNSON and A. S. JOHNSON, JJ., in case cited.)

In *Dubois v. Baker* (30 N. Y., 355), the majority of the court held that "a comparison of hands of papers introduced and relevant, is permitted." The question arose, in this case, on the admissibility of the testimony of witnesses examined as experts. In the majority opinion, delivered by DAVIS, J., he says: "As to the writing upon the erasure, or whether made before or after the body of the note was written, if that rested in opinion, it was a proper inquiry to make of the witness, who was a bank cashier, and therefore qualified to speak as an expert." And he refers to the case of *Doe v. Newton* (5 Adol. & Ellis, 514) as authority for the rule that where instruments are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury, and the genuineness or simulation of the handwriting in question be inferred from such comparison, and says that rule received the approval of the Court of Appeals, in *Van Wyck v. McIntosh* (*supra*).

MULLIN, J., in the same case, who delivered the minority opinion for reversing the judgment on another point, substantially agrees with the majority opinion as to the admissibility of the testimony of the expert witnesses, and says: "It has been held that a witness cannot be permitted to speak of his opinion of handwriting, from comparing that of papers in question in the suit with other papers proved to be genuine, unless the papers with which the comparison is to be made are in evidence in the cause; then the papers thus in evidence may be given to the jury that they may, by comparison, determine a conflict of evidence in relation to the genuineness of the handwriting in issue."

So it would seem that both the majority and minority opinions in *Dubois v. Baker* concur in holding that where a jury may compare



other signatures which are legitimately in evidence in the cause for other purposes, with the disputed signature, for the purpose of inferring by means of such comparison the genuineness of the latter, experts may also be called to give their opinions from the same comparison. In *Randolph v. Loughlin* (48 N. Y., 456) it was held only that notes not in evidence cannot be received for the mere purpose of comparison.

Greenleaf lays down the rule in accordance, as we think, with that to be derived from the case of *Dubois v. Baker*: "When other writings, admitted to be genuine, are already in the case, here the comparison may be made by the jury, *with or without* the aid of experts." (1 Greenlf. Ev., § 578.)

The witnesses, whose testimony in this case was objected to, were experts, although it does not appear whether they had any other acquaintance with the handwriting of the testator than by comparing it with the other writings which had been introduced on the trial. Testimony to handwriting is generally a matter of comparison. The witness compares the signature presented to him with other writing of the party alleged to have written the signature which he has seen him write, or has received under such circumstances as that it is presumed to have been genuine. The comparison is made in the mind of the witness, from the recollection he has of the other writing, and it is doubtful whether it can be more satisfactory than the opinion of a witness whose business has led him to a careful scrutiny of handwriting, formed from the mere juxtaposition of the signature in issue, with others of the same person conceded to be genuine. These witnesses were also asked whether the signature to the note in suit appeared to be simulated, and an attempted imitation of the writings conceded to be genuine. In *Kowing v. Manly* (49 N. Y., 192) it was held that it was not competent, in a civil case, to offer evidence that the signature in question did not appear to be simulated, for the purpose of establishing its genuineness, but the case, we think, impliedly admits, that in order to prove that the signature is not genuine, it may be shown that it appears to be simulated. We think, then, that the weight of authority, and the tendency of modern decisions is to establish the rule, that experts may be examined to give their opinion from a comparison of the disputed signature, with other genuine writings in evidence in the cause, and to state, from an

examination of the genuine writings and the disputed signature, whether the latter appears to be simulated. Of course, all these signatures are open to the examination of the referee or the jury, and they are not concluded by the opinions of the experts, but may hear those opinions on the subject, giving them such weight as, in view of all the circumstances, they may deem them entitled to. We think, therefore, no error was committed by the learned referee in this case, in the admission of the testimony objected to.

The judgment is affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed.

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JOSEPH BUSHNELL, APPELLANT, v. THE CHAUTAUQUA  
COUNTY NATIONAL BANK, RESPONDENT.

*Contract of sale—construction of—National bank—contract—ultra vires.*

This action was brought upon a contract for the sale of oil, which was in the following form: "Sold to Mr. T. A. Shaw \* \* \* for account of B., ten thousand (10,000) barrels of crude petroleum \* \* \* oil, to be delivered at buyer's option, at any time from the 24th day of September, 1874, to the 31st day of December, 1874, \* \* \* to be paid for in cash as delivered, with ten days' notice from buyer to seller \* \* \* if no notice is given contract to expire on the 31st day of December, 1874." *Held*, that the meaning of the provision, that if no notice was given the contract was to expire December 31, 1874, was that the right to call for the oil on ten days' notice, and the consequent obligation to deliver it, should end on that day. It was not intended to provide that the obligations of the purchaser should be annulled by a failure to give the notice, and that there should be no remedy thereafter for breaches existing on that day.

The defendant, a national bank, indorsed upon the back of the contract at the time it was made, that Shaw had on that day deposited in it \$2,500, "to be held by us as collateral security for the faithful performance of the within contract." *Held*,

- (1) That it was within the power of the bank to enter into the said contract.
- (2) That, even if the contract were *ultra vires*, yet as it was not illegal, the defendant was estopped from setting up that defense, as it would be a fraud upon the plaintiff to allow it so to do, he having entered into the contract relying thereon.

APPEAL from a judgment entered on the decision of the Chautauqua Special Term, dismissing a complaint on a demurrer thereto.

The action is brought to recover the sum of \$2,500, which the complaint alleges was deposited by one Shaw, with the defendant, a banking corporation, organized under the act of congress passed 3d June, 1864, and which the defendant agreed to hold as security to the plaintiff, for the faithful performance, by Shaw, of a certain contract made by him with the plaintiff to buy and pay for 10,000 barrels of crude petroleum oil. The complaint alleges that Shaw refused to accept and pay for the oil, and that the plaintiff sustained damage thereby to the amount of \$2,500, being the excess of the contract-price over the market-price of the oil. The contract with Shaw was in these words: "Titusville, Pa., September 24th, 1874. Sold to Mr. T. A. Shaw, Jamestown, N. Y., for account of Mr. Joseph Bushnell, ten thousand (10,000) barrels of crude petroleum, at one dollar and twenty cents per barrel of forty-two (42) gallons in bulk, oil to be delivered at buyer's option, at any time from the 24th day of September, 1874, to the 31st day of December, 1874, both days inclusive, in United Pipe Line receipts, pipeage paid, and to be paid for in cash, as delivered, with ten days' notice from buyer to seller within the time before delivery. If no notice is given, contract to expire on the 31st day of December, 1874. Brokerage, two and one-half cents a barrel, by seller paid." (Signed) "R. T. Leach, Broker." "Accepted." (Signed) "T. A. Shaw." The agreement of the bank was indorsed thereon, as follows: "Jamestown, Sept. 26, '74. T. A. Shaw has this day deposited in the Chautauqua County National Bank, of Jamestown, N. Y., twenty-five hundred dollars (\$2,500) which is to be held by us as security for the faithful fulfillment of the within contract." (Signed) "D. N. Marvin, Cashier." The complaint alleges that the bank, at the making of said deposit, caused the indorsement aforesaid to be made and signed on its behalf by said Marvin, its cashier, upon the contract accepted by Shaw, and to be delivered therewith to the plaintiffs. And that thereafter the plaintiff signed his acceptance to a counterpart of said memorandum signed by the broker, and the same was delivered to Shaw.

*E. C. Sprague*, for the appellant.

*R. P. Marvin*, for the respondent.

SMITH, J.:

The contract between the plaintiff and Shaw contains this provision: "If no notice is given, contract to expire on the 31st day of December, 1874." The notice referred to is the ten days' notice which the buyer was to give to the seller before he could require a delivery of the oil. No notice having been given, the respondent's counsel claims that the contract and all the rights and obligations created by it are at an end. Doubtless that conclusion would be correct if the words "contract to expire" were used in their literal sense. But the contract thus interpreted was no contract at all, or rather, was a unilateral engagement, binding on the seller only. It imposed no obligation whatever on Shaw, for he had it in his power, by not calling for a delivery, to relieve himself from liability, and that, I understand, is the construction contended for by the defendant's counsel. The construction seems unreasonable, and it should not be adopted except upon very clear grounds. That the parties contemplated a mutual obligation can hardly be doubted. The very first word employed by them, "sold," imports an agreement binding on both parties; an obligation on the part of Bushnell to deliver the property at the price agreed on, and on the part of Shaw to receive and pay for it. And there is nothing in the agreement indicating that either party was to be relieved from the obligation thus assumed by him, unless the words in question have that effect. The agreement imposed on the seller very serious obligations. He was required to keep the oil on hand, or to procure it whenever notified by the buyer. The brokerage was paid by him pursuant to the terms of the contract. If the contract is terminated he has lost what he paid, and also the entire consideration for which he entered into the agreement. That the parties regarded the contract as binding upon the buyer as well as the seller seems evident from the fact that the buyer deposited \$2,500 with the bank, and procured it to become liable to that amount for his performance of the contract, and on the faith of that arrangement the plaintiff entered into the agreement. We incline to the opinion that the true meaning of the clause in question is that the right to call for the oil on ten days' notice, and the consequent obligation to deliver it should terminate on the thirty-first of December. Like the stipulation for ten days' notice, it was inserted for the benefit of the seller. It was

not intended to provide that the obligation of both parties should absolutely be annulled, or that there should be no remedy thereafter for breaches existing on the thirty-first of December. On that day, as the complaint alleges, the plaintiff tendered the oil to Shaw and demanded pay, and the latter refused, of all which the defendant had notice. That, we think, was a breach of the agreement by Shaw, which, by force of the defendant's implied undertaking, gave the plaintiff a right of action against the bank.

Another point taken by the respondent's counsel is, that the contract of the bank was *ultra vires*. By undertaking to hold the money as security for the fulfillment of Shaw's contract, the bank, in our opinion, impliedly promised the plaintiff that, in case Shaw failed to perform, the bank would pay to the plaintiff his damages thereby incurred, not exceeding \$2,500. The promise is implied from the terms of the undertaking, and from the fact that the bank caused Shaw's acceptance, with the indorsement of the bank upon it, to be delivered to the plaintiff before he signed the contract with Shaw. The bank had power to receive the deposit. As an incident to that power, it had authority to assent to any terms or conditions respecting the use or disposal of the money deposited which the depositor saw fit to impose, provided they were not illegal or prohibited by the defendant's charter. If Shaw had chosen to deposit the money payable absolutely to the plaintiff or his order, the receipt of it by the bank, and the issuing of a certificate in accordance with those terms, would have been strictly within its legitimate and ordinary business. What difference does it make as to the power of the bank to receive and hold the money, that the deposit was payable to the plaintiff upon the happening of a future contingent event, and that the amount to be paid to him was also contingent and uncertain, but was capable of being definitely ascertained, and was in no event to exceed the amount of the deposit. It is said that a trust was created. In the same sense there is a trust in the case of every bank deposit by one person to the use or credit of another. It is argued by the respondent's counsel that the bank became a surety for Shaw. Not at all. Its obligation was that of a principal debtor. It was indebted to Shaw for the money deposited, and it agreed to discharge its indebtedness by paying to the plaintiff. We are not aware of any provision of law which

incapacitates a national bank from receiving a deposit of money on the terms above stated.

But assuming that the undertaking of the bank was *ultra vires*, yet, as it was not illegal, we think the defendant is estopped from setting up that defense. As has been said, the legal effect of the transaction between the bank and the plaintiff was, that the bank agreed, if he would enter into the contract with Shaw, that he should be compensated out of the money deposited from any damage he might sustain from Shaw's failure to perform. The condition on which Shaw made the deposit was that the bank should undertake to that effect. The agreement of the bank was an appropriation by it of the deposit to the plaintiff's use, by the direction of the depositor. The agreement has been fully executed on the part of the plaintiff by his entering into the proposed obligation to Shaw. It would be a fraud upon him to release the defendant from its part of the agreement, and the bank is therefore estopped from setting up a mere want of power. (*Whitney Arms Co. v. Barlow*, 63 N. Y., 62.)

It was not necessary or proper for the plaintiff to set out the implied promise of the defendant in the complaint. It was enough to allege the facts out of which the implication arises. (*Eno v. Woodworth*, 4 Comst., 249; *Glenny v. Hitchins*, 4 How. Pr., 98; *Cropsey v. Sweeney*, 27 Barb., 310; *Moak's Van Santvoord's Pl.* [3d ed.], 186, and cases there cited.)

These views, if correct, dispose of the several positions taken by the learned counsel for the respondent.

The judgment appealed from should be reversed, and judgment ordered for the plaintiff on the demurrer, with leave to the defendant to answer in twenty days, on payment of the costs of the demurrer and of this appeal.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

EDWARD L. CLARK, RESPONDENT v. CHARLES W. OPDYKE,  
APPELLANT.

*Removal of actions to U. S. Courts under chap. 137 of 1875 — averments in petition not binding upon court.*

This action was brought to procure the removal of the three defendants, two of whom resided in New Jersey and one in New York, from their position as trustees under a mortgage given by the New York and Oswego Midland Railroad Company, and to prevent their acting as trustees *pendent lite*, on the ground that they had been guilty of certain fraudulent and collusive acts whereby the security of the bondholders had been impaired.

The defendant Opdyke, who resided in New Jersey, applied for the removal of the action to the United States Circuit Court, on the ground, among others, that there was a controversy in the suit wholly between the plaintiff and himself, which could be fully determined between them. *Held*, that as the defendants were jointly responsible for their acts as trustees, the plaintiff was entitled to prosecute them jointly, and that there was, therefore, no controversy between the plaintiff and the defendant Opdyke which could be wholly determined between them, and that the application was, therefore, properly denied.

The fact that the suit is brought to enjoin and restrain the defendants, is not a ground of removal under the act of 1875.

Under the act of Congress of 1875, providing that where there is a controversy, which is wholly between citizens of different States, and which can be fully determined as between them, either one or more of the plaintiffs or defendants may remove the suit to the Circuit Court, the averments contained in a petition for such removal are not conclusive upon the court, but the existence of the requisite facts must be ascertained by the court, and for that purpose the averments of the petition in regard to them may be controverted by the opposite party.

APPEAL from an order of the Special Term held in Oneida by Mr. Justice Noxon, denying the prayer of the appellant, Opdyke, to remove this cause, as to him, into the Circuit Court of the United States for the northern district of New York. The plaintiff is a resident of the State of New York. There are three defendants, Stevens and Opdyke, residents of New Jersey, and Hewitt, who at the time of the commencement of the action resided in New York. This action was commenced on the 6th of May, 1876, by the service of a summons and complaint; the latter prayed for a judgment removing said defendants as trustees and appointing others in their place, and that the defendants be enjoined from acting

as trustees *pendent lite*, and that special trustees be appointed meanwhile. On the twenty-fifth of May the defendant Opdyke entered his appearance, and at the same time presented his petition at the Oneida Special Term, praying for the removal of the cause. The petition avers, among other things, that the jurisdiction of the Circuit Court of the United States is involved in the suit; that the matter in dispute arises under the Constitution and laws of the United States; that the action is brought, among other things, for the purpose of restraining and enjoining the defendant Opdyke; and that there is a controversy in the suit wholly between the plaintiff and the defendant Opdyke, which can be fully determined between them. A sufficient bond was presented with the petition, and approved by the judge. The motion for an order of removal was heard upon the petition, on the return of an order to show cause, and upon an opposing affidavit made by one of the attorneys of the plaintiff. The affidavit alleged that this controversy is not wholly between citizens of different States, as alleged in the petition, nor is it a controversy arising under the Constitution and laws of the United States, but as set out in the complaint, is a suit in equity to remove the defendants, as trustees of an express trust created under an instrument executed in this State, on property wholly in this State, and for reasons provided for by the statutes and laws of this State. A copy of the complaint is among the papers submitted to the court.

*Alexander & Green*, for the appellant.

*Risley, Stoddard & Matteson*, for the respondent.

SMITH, J.:

The questions arising upon this appeal are controlled by the provisions of chapter 137 of the act of congress passed in 1875, so far as those provisions are applicable. That act was intended to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from State courts, and it repealed all acts in conflict with its own provisions. We may, therefore, lay out of view the provisions of all prior acts of congress, whether incorporated in the revision of 1873, or not (R. S. of U. S., p. 113, § 639), so far as they are in conflict with the act of 1875. The



second section of the act of 1875 defines the cases in which a suit brought in a State court may be removed into the Circuit Court of the United States. It provides that any suit of a civil nature, at law or in equity, then pending, or thereafter brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and arising under the Constitution or laws of the United States, or treaties made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district. It further provides that when in any suit mentioned in that section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit, etc. The section creates two distinct classes of cases, so far as the matter of citizenship is concerned: one, in which the difference of citizenship exists between all the plaintiffs, on the one hand, and all the defendants, on the other; and a second class, in which less than the whole number of plaintiffs or defendants, by reason of a diversity of residence between themselves and the party opposed to them in a controversy in the suit which can be fully determined as between them, may apply to remove the entire cause. This construction was given to the second section, soon after the passage of the act, by the United States Circuit Court for the northern district of Illinois (DRUMMOND and BLODGETT, JJ., in the case of *Osgood v. Chicago, Danville and Vincennes R. R. Co. et al.*, 14 Am. Law Reg. [N. S.], 506), and the decision in that case was recently reaffirmed in the Circuit Court for the northern district of New York (JOHNSON, J., in *Patterson v. Chapman et al.* and *Bronson et al. v. The Same*, MS. opinion). Obviously the present case is not within the first class. Is it in the second? It is not, unless the suit involves a controversy between the plaintiff and the petitioning defendant, Opdyke, which can be fully determined between them. The act of 1866 (chap. 173) first gave to one of several defendants the right of

removal. But under that act only the particular controversy which concerned him could be removed, without the consent of the plaintiff. Under the act of 1875 the granting of the application of one of several parties will remove the whole suit. What, then, is the nature of the controversy in the present action? The counsel for the appellant insists that the averment in the petition on that subject is conclusive, and that the State court cannot inquire into its truth. That, it is said, is for the United States courts alone. The act of 1833 (4 U. S. Stat. at L., 638), and the act of July 27, 1868, provided that certain matters should be stated in the petition. Under those acts, it was held that when the petition complied with the statute in that respect, the matters so stated could not be controverted on the hearing of the application to remove the cause. (*Dennistoun v. Draper*, 5 Blatch., 338; *Heath v. Austin*, 12 id., 320; *Fisk v. Union Pacific R. R. Co.*, 10 Abb. [N. S.], 457.) The act of 1875 does not prescribe what the petition shall contain, but it provides that when certain facts specified in the act exist, a petition may be made and filed for the removal of the suit. The existence of the requisite facts must be ascertained by the court, and to that end the averments of the petitioner in regard to them may be controverted by the opposite party. Under the act of 1789, which was like that of 1875, in this particular, affidavits or other proofs were frequently received to controvert the petition. (*Anderson v. Manufacturer's Bank*, 14 Abb. R., 436; *Fisk v. The Chicago, Rock Island and Pacific R. R. Co.*, 3 Abb. [N. S.], 453; *Smith v. Butler*, 38 How. Pr., 192; *New York Piano Co. v. New Haven Steamboat Co.*, 2 Abb. [N. S.], 357.)

We are, then, to determine, from the papers before us, whether there is in the suit a controversy between the plaintiff and the defendant Opdyke, which can be fully determined as between them. For that purpose we may look into the complaint, which is referred to in the affidavit read on the part of the plaintiff in opposition to the motion, and is submitted to us with the other appeal papers. The case made by the complaint is, in brief, that the defendants are the trustees in and under a certain trust deed or mortgage executed by the New York and Oswego Midland Railroad Company, a corporation organized under the laws of the State of New York, to construct and operate a railroad in said State, by which mort-

gage said company created a first lien upon its railroad to secure the payment of certain coupon bonds payable in gold, issued by said company, one of which, for the payment of \$1,000, with interest, is owned by the plaintiff; that the defendants, as such trustees, by means of certain fraudulent and collusive acts set out in the complaint, in violation of their duty, have wasted the property of said company, and impaired the security of the bondholders, and that the plaintiff brings the action in behalf of himself and all the other bondholders under said mortgage who may join as plaintiffs in the action. The complaint prays for a judgment removing said defendants as trustees, and appointing others in their place, and that the defendants be enjoined from acting as trustees *pendente lite*, and that special trustees be appointed meanwhile. It appears that the original trustees named in the mortgage resided in the State of New York. The mortgage provides that in case of a vacancy in the trusteeship, by resignation or otherwise, the railroad company of the one part, and the surviving trustees of the other, shall select a new trustee to fill the vacancy, and in case of a disagreement, the holder of not less than twenty per cent of the bonds secured by said mortgage may apply to the Supreme Court of the State of New York to appoint a new trustee to fill the vacancy. The complaint avers that the defendants Opdyke and Stevens were residents of New Jersey when they were appointed trustees to fill vacancies, and that they were fraudulently and collusively appointed, with the design of placing the management of the said mortgage beyond the reach and control of the bondholders and of the Supreme Court of the State of New York.

It seems very clear, upon the case presented by the complaint, that the plaintiff has a right to prosecute the defendants jointly, and that there is no controversy between him and the defendant Opdyke, that can be wholly determined as between them. The trustees have a community of interest and of responsibility. It is the duty of each one to protect the trust property from the acts of his colleagues. For a neglect of that duty, whereby any one or more of several co-trustees have been enabled to misappropriate, or otherwise occasion any loss to the trust estate, the others, as a general rule, will be personally answerable. (Hill on Trustees, 309.) The authorities are not entirely in accord as to whether, in a case where

there are several trustees who are all implicated in a common breach of trust, the *cestui que trust*, on seeking relief in equity, must bring his suit against all of them, or may sue one of them separately, at his election. In *Walker v. Symonds* (3 Swanst. R., 75), Lord ELDON said, that in such case, he may proceed against one, or all, at his election. But in *Munch v. Cockerell* (8 Sim. R., 219) Vice-Chancellor SHADWELL held that the suit must be against all the trustees then living. In a careful opinion he reviewed the case of *Walker v. Symonds*, and remarked that it was doubtful whether Lord ELDON, in saying that the *cestui que trust* "may proceed" against one or all, meant any thing more than that he may proceed after decree against all. Perhaps, however, the better opinion is that in such a case the tort may, by analogy to the law, be treated as several, as well as joint, at the election of the plaintiff. (Story's Eq. Pl., 213, and cases there cited in note 4.) But either rule is fatal to the claim of the appellant. Whether the plaintiff is compelled to sue all jointly, or may do so, at his option, he has sued all jointly in this action. He has elected to treat the liability of the defendants as joint, and against them, jointly, he seeks relief. There is not, therefore, a separate controversy between him and the defendant Opdyke, and the case is not within either of the classes of cases provided for by the act of 1875, in respect to diversity of citizenship.

The petitioner also claims the right of removal on the ground that the matter in dispute arises under the Constitution and laws of the United States. The averment in the petition in that regard is contrived, and there is nothing in the complaint to warrant the claim. The only circumstance that can be laid hold of to countenance it is, that the trustees are charged, among other allegations of fraud, with having caused certain suits to be instituted in the Circuit Court of the United States for the southern district of New York, against the said railroad company and others, and with having procured, in that court, one or more of said trustees to be appointed receivers of the property of the company, in collusion with the officers of the company, in derogation of their duties as trustees, and in defiance of the rights and interests of the bondholders, and that the same proceedings were void for want of jurisdiction. The bare statement of the allegations show, that they involve no matter in dispute arising under the federal Constitution or laws. If the

defendants have used the orders or decrees of the Circuit Court as a means of perpetrating fraud, at the expense of the plaintiff, the State courts, nevertheless, have jurisdiction of the matter.

The only other ground on which the appellant claims the right of removal is that the action is brought to enjoin and restrain the defendants. That was a ground of removal under the act of 1866 and the Revised Statutes (p. 113, § 639), but it is not so under the act of 1875.

The order of the Special Term denying the application is affirmed, with costs and disbursements.

MULLIN, P. J., and TALLOTT, J., concurred.

Order of Special Term affirmed, with ten dollars costs and disbursements.

NOTE.—We are informed by a note appended to the points of the respondent's counsel that since this appeal was taken a motion was made by the plaintiff to the United States Circuit Court to remand the cause to the State court, against the defendant Stevens, who had obtained an *ex parte* order removing this action from the State court to the Circuit Court. The Circuit Court remanded the action, and held that it was not a case to be removed, and that that court had no jurisdiction of the action under the principle laid down in the opinion of JOHNSON, J., above referred to.

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JOHN AUGSBURY, RESPONDENT, v. CHARLES CROSSMAN,  
APPELLANT.

*Bankruptcy act of 1867 — when State insolvent law suspended by — Petition for discharge under State law — relinquishment by petitioning judgment creditor, of the security for his debt — form of.*

The bankruptcy act of March 2, 1867, did not take effect so as to suspend the operation of the insolvent law of this State until June 1, 1867.

A petition, for the discharge of a debtor under the State insolvent law, was signed by a judgment creditor, who indorsed thereon: "For value received I hereby release to the assignee to be appointed, all claims on the estate of Charles Crossman, that I have by reason of the judgment against him assigned to me." *Held*, that this was a sufficient compliance with the provision of 2 Revised Statutes, 38, section 11, requiring any secured creditor, who signs the application, to add to his signature a declaration in writing relinquishing his security for the benefit of all the creditors of the debtor.

APPEAL from a judgment in favor of defendant entered on a verdict rendered by direction of the court, and also from an order denying a motion for a new trial on the minutes.

The action was brought against the defendants, as copartners under the firm name of Crossman, Reynolds & Co., on a promissory note made in the firm name. The defendant Crossman, alone, was served with the summons and complaint. He answered, denying the copartnership and the making of the note by the firm, and setting up a discharge from his debts, under the insolvent law of the State of New York. (2 R. S., 16, *et seq.*) The plaintiff replied, alleging, among other things, that the discharge was void, because the State law, by virtue of which it was granted, was not in force, but had been suspended by the act of congress in relation to bankruptcies, passed in 1867. The bankrupt act was approved on the second day of March. By its fiftieth section it provided as follows: "This act shall commence and take effect as to the appointment of officers created hereby, and the promulgation of rules and general orders, from and after the date of its approval, provided that no petition or other proceeding under this act shall be filed, received or commenced, before the 1st day of June, A. D. 1867." The insolvent's petition was presented to Mr. Justice MULLIN, on the 27th day of February, 1867; on the same day, an order was made by him, requiring the creditors to show cause against a discharge on the 25th of May, 1867, and directing the mode of its service and publication, and on the day specified in the order, the petitioner executed an assignment of all his property, pursuant to the provisions of the act, and the discharge was granted. At the trial, the court directed a verdict for the plaintiff, for the amount of the note.

*L. H. Brown*, for the appellant. The court erred in holding that the fiftieth section of the bankrupt law, approved March 2, 1867, superseded the State insolvent law so as to invalidate the discharge granted under it May 25th, 1867, as it declares in the opinion it did hold. So long as both statutes can stand together a repeal or suspension by implication will not be held intended. (55 N. Y., 616, 617 and case cited; *Davies v. Fairburn*, 3 How. [U. S.], 636-644.) As a general rule, a statute will not be so construed as to allow it to have a retrospective effect beyond or before

the time of its commencement or becoming operative. (5 Hill, 354, 355, and cases cited; *Maines v. Davis*, 32 Barb., 468; *Jarvis v. Jarvis*, 3 Edw. Ch., 462.) Congress could not, by direct or indirect declaration, effect a repeal or suspension; nor in any manner, except by an exercise of its power in establishing an operative active system of bankruptcy. This was not accomplished till June 1st, 1867. (3 Bank. Reg., 110; *Reed v. Taylor*, 7 American R. [32 Iowa, 209], 180; *Day v. Bardwell*, 97 Mass., 246; S. C., 3 Bank. Reg., 115; *Meekin et al. v. Their Creditors*, 19 La. An., 497; 3 Bank. Reg., 511; *Martin v. Berry*, 37 Cal., 208; *Matter of Reynolds*, 5 Am. R. [8 R. L., 485], 615; *Griswold v. Pratt*, 9 Metc. Pr., 16; *Betts v. Bagley*, 12 Pick., 570, 579; *Maltbie v. Hotchkiss*, 38 Conn., 80; S. C., 5 Bank. Reg., 485, 487; *In re Reynolds*, 9 id., 50; *Vap. Nostrand v. Carr*, 30 Md., 128; S. C., 2 Bank. Reg., 485; Bump's L. & P. of Bankruptcy [8th ed.], 293, 295, and cases cited.) Under the bankrupt law of 1841 the following are in point: 9 Rhode Island, 218; 2 Iredell (N. C.), 463. The following were cases where proceedings under the State laws had been commenced as above: *Judd v. Ives* (4 Metc., 401); 97 Massachusetts, 252; 51 New Hampshire, 336; 37 California, 208. See, also, *Chamberlain v. Perkins* (51 N. H., 336); *Barber v. Rodgers* (71 Pa. St., 362); 100 Massachusetts, 287; *In re Winternitz* (18 Pitts. L. J., 61); *Commonwealth v. O'Hara* (3 Pitts., 70); 10 Bankrupt Register, 236. Several of the cases hold that proceedings commenced before the bankrupt law took effect, under State law are not affected by that law. (19 La. An., 497; 5 Rob. [La.], 27; 8 id., 123.)

*Lansing & Sherman*, for the respondent. The bankrupt act approved March 2, 1867, suspended the operation of the insolvent laws of the State from the time the act went into force. (*Sturges v. Crowninshield*, 4 Wheaton, 122; *Ogden v. Saunders*, 12 id., 213; *Griswold v. Pratt*, 9 Metc., 16.) The bankrupt act was passed or approved by the president, on the 2d day of March, 1867, and became operative on that day as a law for every purpose, except that by the proviso in the fiftieth section, no petition or other proceeding under the act could be filed or commenced until the 1st day of June, 1867. Unless some other time is specified in the act itself, an act of congress takes effect from the time it is approved

by the president. (Potter's Dwarries on Statutes, 100; U. S. Const., art. 1, sec. 7; *Matthew v. Zanes*, 7 Wheaton, 164; *Walter v. Richardson*, 2 Story C. C., 571.) The language used by congress in the different sections of the act shows conclusively that the intention of congress was that the act should take effect immediately on its passage. (*Traders' Bank v. Campbell*, 14 Wall., 87; N. Y. Superior Court, *Shears v. Lohringer*, 10 Abb. R. [N. S.], 287; U. S. District Court, Ohio, *Perry v. Langley*, 7 Am. Law Reg., [N. S.], 429-435; *Corner v. Mallory*, 31 Md., 468; 1 U. S. Dig. [N. S.], 111; 1 National Bank. Reg., 98; 7 Blatch., 262-274; Bump on Bankruptcy [5th ed.], 520-522; 6 National Bank. Reg., 43; id., 169-260.)

SMITH, J.:

The only branch of this case which need be considered is that pertaining to the insolvent discharge. The principal question is whether the bankrupt act of 2d of March, 1867, took effect on the day it was approved, so far as to suspend the insolvent law of the State and invalidate all proceedings under it had after that date, or whether its operation in that respect was postponed by the proviso in the fiftieth section, to the 1st day of June, 1867.

The argument on the part of the respondent is, that it being the well-known rule that a statute takes effect from the time of its passage, unless some other time is specified in the act itself, the presumption of law is, that it does so take effect, and the burden is on the defendant in this case to show, by the provisions of the act, that such was not the intention of congress; that the only intent of the proviso, in the fiftieth section, was to delay the commencement of proceedings under the act till the first of June, in order to give time to the court to make rules and appoint officers, and thus provide the machinery without which no proceedings could be had; that the act contains several provisions which show that the act was intended to take effect from the time of its passage, as, for instance, the language in the twenty-ninth section: "if, since the *passage of this act*, he has destroyed, mutilated," etc.; and again, in the same section, "if, being a merchant or tradesman, he has not, subsequently to the *passage of this act*, kept proper books of account;" and in the thirty-ninth section, "that any person residing and owing debts as



aforesaid, who, after the *passage of this act*, shall depart," etc., and in section 44, "that from and after the *passage of this act*, if any debtor," etc.; and finally, that the construction contended for by the respondent's counsel, has been given to the proviso by the Supreme Court of the United States, in the case of *Traders' Bank v. Campbell* (14 Wall., 87).

The answer to the argument of the respondent's counsel is, that the burden resting on the appellant is limited to showing that congress did not intend to invalidate *bona fide* proceedings had under State insolvent laws, prior to the time fixed for the commencement of proceedings under the bankrupt act; that the absence of such intention is not disproved by the prohibition of acts on the part of debtors in fraud of the provisions of the bankrupt act, intermediate the date of its passage and the time fixed for the commencement of proceedings under it; and that all that is decided in *Traders' Bank v. Campbell* (*supra*), is that the provisions of the act designed to prevent frauds upon it on the part of debtors and others, took effect at the time of its passage, notwithstanding the proviso in the fiftieth section. That the decision went no farther, appears from the report of the case. It was an appeal from a decree of the Circuit Court for the northern district of Illinois, in which that court held that a judgment in a State court against the bankrupt taken by confession when both parties knew of his insolvency, though taken before the 1st day of June, 1867, was an unlawful preference under the thirty-fifth section of the bankrupt act, it being taken after the enactment of that law. On the argument before the Supreme Court, the counsel for the appellants took the position, preliminarily, that under the proviso in the fiftieth section, the bill below did not lie, because all the acts complained of took place before the first of June, 1867, prior to which day the proviso declares that no petition or proceeding shall be begun. Mr. Justice MILLER, who delivered the opinion of the court, disposed of the objection in a few words, holding that any act done after the approval of the statute, in fraud of its provisions, was within its prohibitions.

Let us see, then, what is the true construction of the proviso, upon the point in question. The power of congress, on the subject of bankruptcies, is not exclusive of the States. When it is unexecuted by congress, the States are at liberty to exercise the power in its full

extent, unless so far as they are controlled by other constitutional provisions; yet, when congress has acted upon the subject, the power of the States is limited and controlled to the extent of the national legislation. (*Sturges v. Crowninshield*, 4 Wheat., 122; *Ogden v. Saunders*, 12 id., 273.) But the bankrupt act does not affect cases under the insolvent law of a State, pending at the time of its going into force. (*Judd v. Ives*, 4 Metc., 401; *Taylor v. Carryl*, 20 How. [U. S.], 583, and cases there cited; *Appleton v. Bowles*, 2 N. Y. S. C. [T. & C.], 569.) In view of these general principles, it seems evident that by the proviso deferring the commencement of proceedings under the act till the first of June, congress intended that up to that time the insolvent laws of the State should continue in full operation, the same as if the act had not been passed. The only alternative is to conclude that congress intended to prevent access either to the State or federal courts, in cases of insolvency or bankruptcy, from and after the date of the passage of the act, till the time fixed for the commencement of proceedings under it. That intention should not be imputed to the legislature, except upon the clearest language. Indeed it may well be questioned, whether an act intended to have that effect would not transcend the constitutional power of congress. A law prohibiting access to both the federal and the State courts, for the purpose of obtaining an equitable disposition of the estates of bankrupt and insolvent persons, would be a clear perversion and abuse of the power to pass uniform laws on the subject of bankruptcies.

The construction of the proviso in question has been the subject of adjudication in the courts of some of the other States, and in some of the district courts of the United States. A few months after the bankruptcy act went into operation, the Supreme Court of Massachusetts held, in *Day v. Bardwell and others* (97 Mass., 246), that the act did not suspend the insolvent laws of that State, until the 1st day of June, 1867. GRAY, J., delivered the opinion of the court, and discussed the question very thoroughly. In March, 1868, LEAVITT, J., sitting in the United States District Court, Ohio, decided the question the other way, in *Perry v. Langley* (7 Am. Law Reg., 429). There, a debtor made an assignment under the insolvent law of Ohio, on the 25th of May, 1867, and under it a State court took cognizance of the matter. On July seventeenth, a

petition in bankruptcy was filed by a creditor. The court held that, as to that matter, the bankrupt act was in force on May twenty-fifth, and the United States court could rightfully take jurisdiction of the whole matter under the petition filed in July. The views of the court were stated in a carefully prepared opinion, which seems to have omitted no argument that could be advanced in support of the decision, and in which the judge intimates that the ruling is contrary to his first impression. He does not refer to the case of *Day v. Bardwell*, and probably his attention was not called to it. In April, 1869, the same question came before the Supreme Court of California, in the case of *Martin v. Berry* (37 Cal., 208). SANDEESON, J., in delivering the opinion of the court, reviewed at length the opinion of LEAVITT, J., in *Perry v. Langley* (*supra*), and dissented from its reasoning and conclusions. His examination of the question is exhaustive, and to my mind is convincing. In accordance with it, the court held that the insolvent law of California was not suspended by the bankrupt act till the first day of June. In December, 1871, the Supreme Court of New Hampshire decided the question the same way, in *Chamberlain v. Perkins* (51 N. H., 336). The opinion cites and follows *Day v. Bardwell*, and disapproves of *Perry v. Langley*. The only case in this State to which I have been referred, is *Shears v. Solhinger* (10 Abb. [N. S.], 287), cited by the respondent's counsel. It throws no light upon the question. For aught that appears the insolvent proceedings, referred to in that case, were commenced after the 1st of June, 1867. All that is said in the report, on that point, is that they were commenced "since the bankrupt act went into operation." I entertain the opinion, very confidently, that the insolvent law of this State was not suspended until the 1st day of June, 1867, and that the discharge, granted on the twenty-fifth of May, was not invalidated by the provisions of the bankrupt act.

The respondent's counsel also insists that the discharge was void, under the State law, by reason of certain jurisdictional defects.

It is said that the petition was not signed by creditors representing two-thirds of the debts of the insolvent. The statute requires that the petition shall be signed by the insolvent debtor and "by so many of his creditors residing within the United States, as have debts in good faith owing to them by such debtor, then due or thereafter to

become due, and amounting to at least two-thirds of all the debts owing by him to creditors residing within the United States." (2 R. S., 16, § 2.) It also provides that "whenever a petitioning creditor shall have \* \* \* any mortgage, judgment, or other security, for securing the payment of any sum of money, upon any real or personal estate of the debtor, \* \* \* he shall not become a petitioner in respect to the debt so secured, unless he shall add to his signature to the petition a declaration in writing that he relinquishes to the assignees \* \* \* every such \* \* \* security, for the benefit of all the creditors of such debtor; which declaration shall operate as an assignment of such \* \* \* security to the assignees, \* \* \* and vest in them all the rights and interest of such petitioning creditor therein." (Id., 36, § 11.) The whole amount of debts appearing by the inventory in evidence in this case is \$10,118.74; two-thirds of which is \$6,745.82. The debts owing to the petitioning creditors amount to \$8,726.43. Of those, debts to the amount of \$3,436.51 were secured by judgment, to wit: Bagley, \$108.50; Leepy, \$741.63; Ross, \$850; Clark, \$1,736. Each of those judgment creditors added to his signature to the petition a declaration purporting to be a relinquishment of his judgment, but the respondent's counsel claims that such declaration is insufficient in each case. That claim presents the only question involved in the point now under consideration. The declarations attached to the signatures of Bagley, Leepy and Ross, respectively, are substantially alike. That of Bagley is in these words: "For value received, I hereby release to the assignee, to be appointed, all claims on the estate of Charles Crossman, that I have by reason of the judgment against him assigned to me." It is true, this does not follow the words of the statute, but the statute does not prescribe the form. It is a substantial compliance. A release of all claims on the estate of the judgment debtor, by reason of the judgment against him, amounts to a relinquishment of the judgment; and a release to the assignee, is necessarily a release to him for the benefit of all the creditors of the debtor, as it is the duty of the assignee to appropriate to their benefit all the rights and property of the debtor thus released to him. The debts owing to Bagley, Leepy and Ross, and secured by judgment, therefore go to make up the two-thirds. The declaration, signed by Clark, seems to be imperfect. There was, evidently, an

omission to fill a blank left in drawing it, so that it makes no reference to the judgment held by him. But there are two-thirds without counting his judgment debt.

I have examined all the other objections taken to the sufficiency of the papers, and the jurisdiction of the judge, and think them devoid of merit. This is so apparent that it is hardly necessary to state them, or the reasons for so holding.

As the discharge is regarded as valid, it follows that the judgment should be reversed and a new trial had, costs to abide event.

MULLIN, P. J., and TALLOTT, J., concurred.

Judgment reversed and new trial ordered, costs to abide the event.

CORNELIA VAN ALLEN, RESPONDENT, v. FARMERS' JOINT-STOCK INSURANCE COMPANY, APPELLANT.

*Agent of insurance company — powers of — when company bound by acts of — waiver of condition of policy.*

An agent of an insurance company was authorized by his certificate of appointment to make surveys and receive applications for insurance and premiums upon the same, according to the regulations and by-laws of the company. It appeared that, in addition to the acts authorized by the certificate of appointment, he also received and forwarded notices of loss to the company, which were acted upon by it; that he generally informed persons taking out policies to notify him in case of loss; that several persons did so, and the company, upon being notified by him, sent on their general agent and adjuster, who settled the claims without any proofs of loss. *Held*, that the company held the agent out, as authorized by it, to receive notices of loss, and that he therefore had apparent authority to extend the time for serving them or to waive them altogether.

Defendant's agent, having been notified by the plaintiff of a loss sustained by her, informed the company thereof, and received from it a letter stating that its general agent would be on in a few days and attend to the matter. Subsequently, and before the expiration of twenty days from the loss, plaintiff made due proofs of loss and presented them to the agent, who told her that he had notified the company; that its general agent would be on to settle the loss in a few days, and that she might go home and rest easy until he came. After the twenty days had expired the general agent came, and gave plaintiff to under-

stand that if he should find the fire was not fraudulent there was no obstacle in the way of adjusting her loss; thereafter the plaintiff sent due proofs of loss, which were returned by the company on the ground that they were not furnished in time.

The policy contained a condition requiring proof of loss to be furnished within twenty days after the loss, and provided that no condition or restriction of the policy should be waived except by an express agreement in writing signed by an officer of the company.

In an action to recover upon the policy, the company set up a failure to furnish proofs of loss as a defense. *Held*, that the acts of the agent constituted a waiver of the conditions of the policy, and that the company could not avail itself of a breach thereof as a defense to the action.

MOTION by defendant for a new trial on exceptions ordered to be heard at the General Term, in the first instance.

The action was brought upon a policy of insurance against loss by fire. Certain conditions were annexed to the policy and made a part of the contract, one of which was in the following words: "All persons insured by this company and sustaining loss or damage by fire, shall forthwith give the company notice thereof in writing, and within twenty days after the loss, shall deliver a particular account of such loss, signed and sworn to by them," etc. The policy contained this provision: "The use of general terms, or any thing less than a distinct, specific agreement, clearly expressed in writing, and signed by an officer of the company, shall not be construed as a waiver of any written or printed condition or restriction of this policy."

A part of the insured property was destroyed by fire on the 2d February, 1872. The next day the plaintiff notified the local agent of the defendant, through whom the insurance was effected, of such loss, and the agent gave notice to the defendant by letter. The defendant's secretary wrote the agent that their adjuster was away, but would attend to the matter as soon as he returned and that he would notify the agent. Subsequently, the plaintiff prepared a particular account of her loss, and not having heard from the agent, she called on him and stated that the policy required her to furnish a statement of loss within twenty days, and that she had her papers made out. The twenty days had not then elapsed. The agent replied that he had notified the company and they had written him that Peak, their general agent and adjuster, would be on and settle the loss, and told her to go home and rest easy till Peak came.

Shortly after the expiration of the twenty days, Peak visited the place, saw the plaintiff, and told her the company paid very promptly, but there had been so much said about the fire he would investigate the matter, and let her know. Plaintiff waited, but Peak did not again see her or communicate with her. On the twenty-fifth of April she mailed an account of loss to the defendant. It was returned immediately, on the ground that it was not furnished within the time prescribed by the policy. The plaintiff then commenced this action. At the trial, the judge ordered a verdict for the plaintiff, holding that the conditions respecting notice and proofs of loss were waived.

*D. Pratt*, for the defendant.

*M. Hopkins*, for the plaintiff.

SMITH, J.:

The policy required written notice of the loss to be given forthwith, but it is evident from the testimony of Willetts, the agent of the company, and of Lawrence, the secretary, that the verbal notice of loss given by the plaintiff to Willetts the day after the fire, and by him communicated to the home office, was treated by the company as a sufficient compliance with that requirement of the policy.

A graver, and really the only, question in the case is, whether the defendant waived the condition requiring proofs of loss to be furnished within twenty days. But I am inclined to think that question also was properly disposed of at the Circuit.

It has been held, repeatedly, in this State that a condition may be waived by parol, notwithstanding a provision in the policy that nothing but a written agreement signed by an officer of the company shall have that effect. The provision requiring a waiver to be in writing may itself be waived. (*Ames v. N. Y. Union Ins. Co.*, 14 N. Y., 253; *Goit v. National Protection Ins. Co.*, 25 Barb., 189; *Carroll v. Charter Oak Ins. Co.*, 38 id., 402; *Pitney v. Glen's Falls Ins. Co.*, 61 id., 335; *Whitwell v. Putnam Ins. Co.*, 6 Lans., 166; *Parker v. Arctic Fire Ins. Co.*, 1 N. Y. S. C. [T. & C.], 397; *Van Allen v. Farmers' Joint-Stock Ins. Co.*, 6 id., 593.)

It is also well settled that, while a party bound to perform has

still time and opportunity for so doing, if something be said or done by the other party, by which the former is induced to believe that the condition is waived, or that strict compliance will not be insisted on, the latter is estopped from claiming non-performance of the condition. (*Bumstead v. The Dividend Mutual Ins. Co.*, 12 N. Y., 81, and cases there cited by ALLEN, J., page 97; *Ames v. The N. Y. Union Ins. Co.*, 14 N. Y., 253, 263; *O'Neil v. Buffalo Mutual Ins. Co.*, 3 Comst., 122; *Post v. Aetna Ins. Co.*, 43 Barb., 351.)

It appeared at the trial that proofs of loss were not furnished until some ten weeks after the fire. But the plaintiff testified, in substance, that her omission to serve them within the time limited by the policy was in consequence of a statement made to her by Willetts, the local agent of the defendant, that she need not do any thing beyond giving notice of the loss till the adjuster of the company had called on her. Her testimony on that point is corroborated, in the main, by Willetts. He does not deny that he made the statement which she testified to. The only part of his testimony that can be regarded as not entirely in accordance with hers, is his impression that he told her "she must go by the policy." It is insisted by the defendant's counsel that this conflicts with the plaintiff's testimony, and that the question should have been submitted to the jury. The point is not now available to the defendant, in view of the manner in which the case was disposed of at the Circuit. At the close of the testimony the defendant's counsel moved for a nonsuit, and the motion having been denied, he did not ask to have any question of fact submitted to the jury, but contented himself with excepting to the direction of a verdict for the plaintiff. The case was treated on all hands as one in which there was no conflict of testimony, and which presented questions of law only. The defendant is to be regarded, therefore, as having waived the point that the testimony was conflicting in the particular referred to, or as having consented that the question of fact, if one existed, should be decided by the court instead of the jury. (*Barnes v. Perine*, 12 N. Y., 18; *Winchell v. Hicks*, 18 id., 558; *O'Neill v. James*, 43 id., 84; *Stone v. Flower*, 47 id., 566; *Collins v. Burns*, 63 id., 1.)

Passing that point, it is apparent that, if Willetts had authority



to waive the furnishing of proofs within the time specified by the policy, his statement to the plaintiff, testified to by her, was enough to constitute such waiver. The question is not merely what his real authority was, as between him and the company, but how was he held out by the company; had the plaintiff reason to infer from the acts of the company that he possessed authority to waive compliance with the provision in question? His actual authority, as expressed in his certificate of appointment, was merely to make surveys and receive applications for insurance, and premiums on the same, according to the regulations and by-laws of the company. What the regulations and by-laws on the subject were does not appear. But the evidence is, that he not only received applications for insurance and collected premiums, but he also, in excess of the power conferred by his certificate of appointment, received notices of loss, and sent them to the secretary, and the company acted upon them as valid notices. That was done in this case. Generally, when he procured policies he told the applicants to notify him in case of loss, and in several instances the parties did so, and the company, on being informed by him of such notice, sent on their general agent and adjusted the claim without any proofs of loss being furnished. And in all the dealing between the plaintiff and the company, the latter was represented by Willetts, except that the policy was mailed to the plaintiff directly from the home office, indorsed with the name of Willetts as agent.

It is very clear, therefore, that the company held Willetts out as authorized by them to receive notices of loss, upon policies issued on applications made to him. The requirement respecting proofs of loss, and notice of loss, is in one and the same clause of the policy. It does not specify to whom, or at what place, proofs shall be furnished. Merely, that they shall be furnished within twenty days. Within that time, the plaintiff went to Willetts for the purpose of complying with that condition, ready and offering to do so. He told her she need do nothing then; to rest easy till Peak came, and he would adjust the loss. He told her, also, that the secretary of the company had written in answer to the notice of loss, that Peak would come and attend to the matter as soon as he returned home, and would notify Willetts of his coming; and in fact the secretary had so written.

If the opinion already expressed is correct, that Willetts had apparent authority to receive proofs of loss, it follows that he had apparent authority, also, to extend the time for serving them, or to waive them altogether. And the conclusion is fully warranted that the company held him out as competent to give the direction which he did give to the plaintiff, and she having relied and acted upon it, the company is estopped from disputing the agent's authority.

It is said, however, that this very question was decided otherwise by the Court of Appeals, on the review of a former trial of this case, in which that court reversed a verdict in favor of the plaintiff. It appears from the manuscript opinion of the court with which we are favored, that the reversal was upon the ground that the judge erred in charging the jury that Willetts had a right to waive the provision in the policy requiring the plaintiff to furnish the proofs of loss. In so charging, the judge took the question of waiver from the jury. But upon the trial now under review, the counsel for the respective parties, as we have seen, treated the case as involving questions of law only, or consented that the questions of fact, if any, should be decided by the court instead of the jury, and as the evidence warranted the conclusion of the judge, the error pointed out by the Court of Appeals is eliminated from the case.

There is another view of the case, in which the defendant must be deemed to have waived the condition respecting proofs of loss, or to have consented to the delay. Peak, the general agent and adjuster, undoubtedly had authority to waive a compliance with the condition, since it distinctly appears that he had power to settle and pay losses, at his discretion, with or without proofs of loss. He called on the plaintiff after the expiration of the twenty days, talked with her about the fire, told her he had learned some circumstances indicating fraud, and he would investigate the matter and would take further time for that purpose. The plaintiff testified that he said he would come again at the end of thirty days, and let her know. That he denies, but it is not very material. Whether he used those words or not, she had the right to infer from what he did say, that she needed to do nothing further till she learned the result of his investigation. He did not call on her again, and she, after waiting till she was convinced that he did not intend to come,

sent her proofs of loss to the office of the company. Why were not the words and acts of Peak a waiver? The defendant's counsel say they were not, for two reasons, first, because the time to furnish proofs of loss had expired before Peak saw the plaintiff; and secondly, because Peak did not know at the time that they had not been furnished. The answer to the first position is that the letter of the secretary, in view of the circumstances, is to be regarded as an extension of the time to furnish proofs of loss, till Peak should call on the plaintiff. The circumstances referred to are those above detailed attending the writing of the letter, and the communicating of its contents to the plaintiff; the practice pursued by the company of dispensing with proofs of loss in other instances, and the fact that Peak had general authority to pay or reject claims, with or without proofs of loss being furnished. As to the second position, it is not material whether Peak knew or did not know that proofs had not been served at the time of his interview with the plaintiff. The company knew that none had been received at the home office, and the knowledge of the principal was enough. It was the fault of the principal if the knowledge which the home office had on the subject was not communicated to the agent. But let us look at the extent of Peak's knowledge on the subject. He testified that his practice was, when informed of a loss, to inquire for the proofs of loss at the home office, unless they were handed to him by the secretary. He did not say that the usual practice was departed from in this instance. The inference is well warranted that when he left the office of the company to adjust the plaintiff's loss, he knew that the proofs of loss had not then been received. And when he testified that, at the time of his interview with the plaintiff, he did not know whether proofs of loss had been served or not, his statement amounted to nothing more than saying that he did not know whether proofs of loss had been served at the office of the company subsequently to the time when he left it. It is apparent that, in his interview with the plaintiff, he did not think it material to know whether she had served proofs of loss since he was at the office. If he had thought it of any importance, he could have learned how the fact was by inquiring of the plaintiff or of Willetts, but he did not inquire.

The time to serve proofs of loss having been extended by the

secretary of the company till the arrival of Peak, and Peak having given the plaintiff to understand that there was no obstacle in the way of adjusting her claim, if he should find on investigation that the fire was not fraudulent, the waiver was complete, and the defendant is estopped from setting up the delay in the service of the proofs of loss to defeat the claim.

In the recent case of *The Home Insurance Company of New York v. The Baltimore Warehouse Company* (16 Am. Law. Reg., 162, 168) the Supreme Court of the United States held that when it was testified, on the trial, that the agent of the insurance company, who was authorized to settle losses without interference from the parent office, after the time for presenting preliminary proofs had gone by, acted and spoke as if they had been presented in season, and while resisting the claim, placed his objections on other grounds, and never alluded to any failure to present preliminary proofs until those objections had been swept away; and after paying for a loss of twenty-four bales of cotton, and receiving notice that the policy would be retained to assert other claims under it, expressly waived another condition for the purpose of giving the insured a continuing right to bring a suit, the jury may well infer that the condition of giving notice of loss and making preliminary proof was waived. It seems, from the note of the case, that the conduct and language of the agent respecting the proofs of loss were treated as a clear act of waiver, proper to be considered by the jury, and, of course, sufficient of themselves, if the jury should so regard them, to warrant a finding of waiver, and that, too, although the time for presenting the proofs had elapsed. The present case is stronger for the plaintiff, as the extended time for serving proofs had not expired when the acts of waiver occurred.

The motion for a new trial should be denied, and judgment ordered for the plaintiff on the verdict.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

JOHN H. PHILLIPS AND OTHERS, AS COMMISSIONERS OF HIGHWAYS OF THE TOWN OF TONAWANDA, APPELLANTS, v. CONRAD SCHUMACHER.

*Commissioners of highways—order directing removal of encroachment—form of, when signed by only two commissioners—chapter 482 of 1875—not a local bill—constitutionality of—Power of board of supervisors to reduce width of highway—notice to parties interested.*

Where an order, directing the removal of an encroachment upon a public highway, is signed by only two of the commissioners, it must clearly appear upon the face thereof that all of the commissioners were notified to attend a meeting to deliberate thereon.

The order should contain the words, "all the commissioners," or their equivalent; words that may or may not mean "all" are not enough.

*Quare*, as to what is a sufficient notice of the purpose of the meeting.

Chapter 482 of 1875, entitled "An act to confer on boards of supervisors further powers of local legislation and administration, and to regulate the compensation of supervisors," is not a local bill within the meaning of the constitutional provision (art. 3, sec. 16), providing that no private or local bill shall embrace more than one subject, and that shall be expressed in the title; and even if it were so, it embraces but one subject, which is distinctly expressed in its title.

Subdivision 10 of section 1 of said act, conferring upon boards of supervisors authority "to authorize the laying out of highways of a less width than is now required by law, and reducing the width of highways now in existence," confers no power upon such boards to adopt a resolution or ordinance which shall have the effect, *proprio vigore*, of establishing such a road or reducing the width of one already in existence, but merely authorizes them to provide, by suitable legislation, for the doing of those acts by commissioners of highways, or such other suitable agencies as the boards may, in their discretion, appoint.

Under said act the boards have no power to authorize proceedings in such cases without an application from, or notice to parties interested therein, and without giving such parties an opportunity to be heard.

The proper way to exercise the power conferred by the act would be to pass an act authorizing the commissioners of highways of the town, or the other officers or persons designated by the board, to entertain proceedings to reduce the width of the road in question on application and notice as specified in the act.

**APPEAL** from order of the Erie County Court refusing a new trial.

The action was brought to recover the statute penalty for an alleged encroachment, by defendant's fences, on what is known as

the Two Mile Creek road, in Tonawanda. The County Court directed a verdict for the defendant. The principal controversy was, whether the road was three rods or four rods wide, on the defendant's premises, it being conceded that if it was only three rods wide the defendant had not encroached on it. The road was surveyed in 1820, but that survey was not recorded, and no order was then made laying out the road, but the work of clearing through the woods for a road was commenced that year, and a road was opened, worked and used, more or less, until 1851, but it did not follow the line of the survey at all points, nor was it of the width of four rods. On the 4th of April, 1851, the commissioners made a new survey, and fixed the width of the road at four rods, by an order which they caused to be recorded. The new survey was intended to follow the old one as far as practicable, but as the blazed trees, the only monuments of the old survey, were not then standing, the location of the old line could not be definitely ascertained. In surveying the road four rods wide its lines were frequently extended beyond the fences that adjoined the road as theretofore used, and they ran through several buildings, orchards, gardens and door yards. There is no evidence that the consent of the owners was given, that a jury was called, or that there was an appraisal or payment of damages. It appeared, however, that the defendant subsequently to the making of the order of 1851, and in that year, moved his fences out, by direction of the commissioners, and made the road wider; and in 1866, by their direction, he moved his fences still further out, and they so remained until 1873, when he moved them in, making the road less than four rods, but leaving it at least three rods wide on his land.

On the 10th of August, 1874, two of the commissioners made an order which recited that the road in question had been laid out of the width of four rods, but had never been sufficiently described and recorded, and ordered that it be according to a survey therein incorporated, and that it be four rods wide. On the same day they made another order, declaring the defendant's fences an encroachment, and directing their removal. The latter order was in these words: "We, the commissioners of highways of the town of Tonawanda, in the county of Erie, having ascertained that the outer line of a public highway in said town is described as follows, to wit"

(describing it by courses and distances, and also describing the alleged encroachment): "It is, therefore, ordered by the commissioners of highways of said town that the said fences be removed, so that the said highway be open and unobstructed, and of the breadth which was originally intended, which was four rods."

"Done at a meeting of the commissioners of highways of the said town of Tonawanda on the 10th day of August, 1874, said commissioners having been notified to attend said meeting for the purpose of deliberating on the subject of this order." (Signed) "J. H. Phillips, Philip Pirson, commissioners." The town had three commissioners at the time.

It appeared in evidence, that after the commencement of the suit, and shortly before the trial, the board of supervisors of Erie county passed an act reducing the width of the road to three rods, its whole length.

*S. Lockwood*, for the appellants.

*Lewis & Gurney*, for the respondent.

SMITH, J. :

- It is not material to inquire whether there was a valid survey and record of the highway in question as a four-rod road, prior to 1851. Nor is it material to determine whether the order made in April of that year, was a nullity, so far as it attempted to lay the road on a new line, and to increase its width by taking in buildings and grounds which could not be acquired without the consent of the owners. That the defendant gave his consent thereto is to be implied from the fact, that he complied with the order of the commissioners, without objection, and removed his fences to the lines designated by them. And as his fences remained where he so placed them for more than six years uninterruptedly, and the soil between them was worked and used as a public highway, during the whole time, the jury would have been warranted in finding a highway across his premises by dedication and acceptance. The evidence also warranted the conclusion that the defendant, when he moved his fences in 1873, encroached upon the limits of the highway as theretofore used.

But it was essential to the plaintiffs' cause of action that they should show a valid order of the commissioners, specifying the alleged encroachment, and directing the defendant to remove it. (1 R. S., 521, § 103.) The order which was put in evidence for that purpose was made by only two of the three commissioners. To be of any validity, it must be shown upon its face, that it conformed to the following provision of the statute: "Any two commissioners of highways of any town may make an order in execution of the powers conferred in this title, provided it shall appear in the order filed by them that all the commissioners of highways of the town met and deliberated on the subject embraced in such order, or were notified to attend a meeting of the commissioners for the purpose of deliberating thereon." (1 R. S., 525, § 125.)

It does not appear from the order that all the commissioners met. Therefore, to satisfy the requirement of the proviso, the order must show that the third commissioner was notified to attend the meeting, and, also, that he was notified that the meeting was to be held for the purpose of deliberating on the subject embraced in the order. In the first of these respects, the order seems clearly defective. It does not show that the absent commissioner was notified of the meeting. All that appears is, that the two who signed the order were notified. The expressions, "We, the commissioners of highways, having ascertained," "it is therefore ordered by the commissioners," and "done at a meeting of the commissioners," obviously refer to the two commissioners alone, who "met," "ascertained" and "ordered," and who, by affixing their signatures to the order, designated themselves as the persons referred to. And when the order says, at the close, "said commissioners having been notified," it necessarily refers to the same commissioners previously mentioned therein, and no others; in short, the statements in the order may be strictly true, and yet the absent commissioner have had no notice of the meeting.

That this defect in the order, declaring the encroachment and directing its removal, was not the result of inadvertence or ignorance of the statute is apparent from the form of the other order made at the same time, by the same two commissioners, declaring the road to be four rods in width, which closed by saying, "done at a meeting of the commissioners of said town, etc., all of said



commissioners having been notified to attend said meeting for the purpose of deliberating on the subject of this order." In *The People v. Hynds* (30 N. Y., 470) the order recited that notice was given "that the undersigned commissioners of highways of said town would attend," etc., and the order was signed by but two of the three commissioners of the town, and did not show that they all met; held void as made by two commissioners without the intervention of the third, or notice to him recited in the order. HOGEBOM, J., delivering the opinion of the court, said "the statute was intended to make an absolute and universal rule for cases of this kind, and to prevent any presumptions whatever." (P. 473.) The statute says "all" the commissioners, and the order, should have used the same words, or their equivalent; words that may or may not mean "all" are not enough. It is unnecessary to cite authorities to show that this defect is fatal to the order, and to all proceedings based upon it.

It is also insisted, by the respondent's counsel, that the recital does not show that the notice of the purpose of the meeting was sufficient. It is contended that there is a material difference between the "purpose of deliberating on the subject embraced in an order" and that of "deliberating on the subject of such order;" or, in other words, that the order itself is one subject, and the matter embraced in it is another, and a very different one. Whatever force there may be in this argument, it is not necessary to pass upon it, if the opinion already expressed as to the validity of the order is correct.

Another position taken by the counsel for the respondent is, that the act of the board of supervisors reducing the width of the road in question to three rods took away the plaintiff's cause of action. It is urged, in reply, that the statute under which the board of supervisors acted (Laws 1875, chap. 482) is unconstitutional. The reason assigned is that it is a local law, and the title does not express its local nature. The Constitution provides that no private or local bill shall embrace more than one subject, and that shall be expressed in the title. (Art. 3, § 16.) The title of the act is, "An act to confer on boards of supervisors further powers of local legislation and administration, and to regulate the compensation of supervisors." The act was passed in pursuance of the constitutional

provision authorizing the legislature, by general laws, to confer additional powers of local legislation and administration on boards of supervisors (art. 3, § 23), and in consequence of the amendment to the Constitution, which took effect on the 1st of January, 1875, prohibiting the legislature from passing a private or local bill in any of the cases therein specified. (Art. 3, § 18.) The act, by its terms, extends to every county in the State, "except in cities whose boundaries are the same as those of the county." Judicial cognizance may be taken of the fact that the only city in the State whose boundaries are the same as those of the county is New York. If its boundaries should cease to be coterminous with those of the county, that city would fall within the act without further legislation. The provisions of the act are, in their nature, applicable to every county in the State, and none is excepted by name. The act, therefore, is not local within the meaning of the Constitution. Furthermore, whether local or not, it embraces but one subject and that is distinctly expressed in its title. The conferring of further powers on boards of supervisors, and the regulating of the compensation of supervisors in view of the additional time and labor which the discharge of their duties will necessarily require, is but one subject of legislation. The latter is incidental to the former. (*Harris v. The People*, 59 N. Y., 599; *Devlin v. The Mayor*, 63 id., 8; *The People v. Banks*, decided by the Court of Appeals in December, 1876, and not reported, 4 N. Y. W. Dig., 124.)

A more serious question is, whether the act passed by the board of supervisors of Erie, was within the scope of their authority. The act of the legislature, above referred to, confers powers of legislation in relation to divers subjects specified in the first section of the act. In respect to some of the subjects the boards are vested with the power of complete and final action; in respect to others they have no power except to *authorize* action by other local officers or municipal corporations. Their power in respect to laying out and reducing the width of highways is of the latter description. It is given by the tenth subdivision of section one, which is in these words: "To authorize the laying out of highways of a less width than is now required by law, and of reducing the width of highways now in existence." The provision gives no power to boards of supervisors to adopt a resolution or ordinance which shall have the effect, *pro-*

*prio vigore*, to establish a road or reduce the width of one previously existing. The power conferred is to *authorize* the acts specified to be done; that is, to provide by suitable legislation for the doing of those acts by commissioners of highways, or such other suitable agencies as the boards, in their discretion, may appoint. When the act of 1875 was adopted all public roads to be laid out by the commissioners of highways of any town were required to be not less than three rods wide. (1 R. S., 517, § 80.) The object of the provision in question was to empower boards of supervisors to authorize the laying out of highways of a less width than the statute then required. The board of supervisors of Erie, in undertaking, by a direct enactment, to reduce the width of the road in question, exceeded their authority. But if the resolution of the board had been within the scope of their power it was fatally defective, I conceive, inasmuch as for aught that appears, it was passed without notice to any one. It is not to be presumed that the legislature intended to authorize proceedings in such cases without an application from or notice to parties interested, and without giving such parties an opportunity to be heard. In this case the commissioners of highways of the town, as the representatives of the public, had a direct interest in the matter. The statute which authorizes a proceeding to alter or discontinue a highway gives the right of appeal to any person aggrieved, whether the order directs or refuses the altering or discontinuing of the highway. (1 R. S., 513, §§ 55, 56; *id.*, 518, §§ 83, 84; Amd. L., 1847, chap. 455, § 8.) In analogy to those provisions notice of some kind should be given at some stage of the proceedings to reduce the width of an established highway, or to lay out a new one less than four rods wide. A proper exercise of the power of the board would be to pass an act authorizing the commissioners of highways of the town, or other officers or persons designated, to entertain proceedings to reduce the width of the road in question, on application and notice as specified in the act. Probably the boards have power to pass a special or a general act, in their discretion, but in either case, the act should prescribe a mode of procedure which will require the giving of notice to persons directly interested, or will secure to any aggrieved party a right of review similar to the provisions of the Revised Statutes in analogous cases.

The act of 1875 provides that the powers thereby conferred shall

be exercised by boards of supervisors, at stated, special or adjourned sessions as therein prescribed (§ 2), and that every resolution adopted in pursuance of the provisions of the first section of the act, shall be prefixed by a title concisely expressing its contents, following which shall be a reference to the law or laws from which the authority to pass the resolution shall be derived, and a statement of the vote, whether by two-thirds or a majority of all, by which it was passed, and in the cases where it is required that the resolution should receive the assent of the supervisor of the town to which it applies, the fact whether or not it received such assent shall be also stated. (Id.) Whether these provisions, so far as they are applicable to the resolution in question, were complied with in its passage, does not appear. The printed case purports to give the resolution *verbatim*, but it contains no title or statement of the vote. The resolution, when offered in evidence, was objected to on several grounds, but not on the ground that it did not comply with the provisions of the act above stated. We are to assume, therefore, that it was sufficient in those respects, or if not, that the defect was waived.

But for the reasons already expressed, we are of the opinion that the resolution exceeded the powers of the board and was void. This conclusion disposes of the point made by the defendant's counsel that the resolution of the board had the effect to supersede the penalties theretofore incurred by encroachments, upon that portion of the highway lying between the three-rod and the four-rod limits.

By reason of the invalidity of the order declaring the encroachment, we think the decision of the court below was right and should be affirmed.

Order denying a new trial affirmed.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

JOHN SCHROEDER, APPELLANT, v. WILLIAM H. GURNEY  
AND OTHERS, RESPONDENTS.

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*Recording act — Bona fide purchaser — Proceedings to determine conflicting claims to real property — when maintainable.*

July 11, 1866, N. Case conveyed certain real estate to one Catharine M. Brierly in trust to receive the rents, and apply the same to the use of herself and B. W. Case, the premises to revert, after the death of Brierly and B. W. Case, to the issue or heirs at law of the latter, if he left any, otherwise to the heirs of the grantor.

The deed was lost soon after execution, but was afterwards found and was recorded March 1, 1875. N. Case continued in possession of the land. Brierly died in 1870, and devised her interest in the premises to B. W. Case. In 1872 N. Case, as special guardian of B. W. Case, in pursuance of an order of the County Court, conveyed the premises to the plaintiff for \$2,000, he giving back a mortgage (without any personal covenant on his part) to secure the same, payable on B. W. Case's arriving at age. Plaintiff, at the time of his purchase, knew that a former deed had been given and lost, but did not know its contents. About the same time, to perfect the record, he took a deed from N. Case individually, upon the same consideration as the deed from the special guardian—the deed being dated January 1, 1868, and recorded February 12, 1875. *Held*, (1) that the deed from the special guardian was a nullity, as the infant had no interest in the premises; (2) that the deed from Case was not entitled to priority over the trust deed, for the reason that the plaintiff was not a *bona fide* purchaser thereunder, the only consideration therefor being a mortgage not yet due.

One who is in possession of real property, claiming title thereto, is possessed of a sufficient estate therein to maintain proceedings under the Revised Statutes to determine conflicting claims thereto.

Courts of equity will generally give relief under a bill *quia timet*, only where it is necessary to resort to extrinsic evidence not of record, to show the invalidity of the instrument constituting the apparent cloud upon the title.

APPEAL from a judgment entered on the decision of the court at Special Term in Erie county, dismissing the complaint on the merits, with costs.

This action was brought to determine conflicting claims to real property and to remove a cloud from the plaintiff's title.

On the 10th day of July, 1866, Nehemiah Case, being seized in fee and in the possession of fifty acres of land in the town of Brant (the real estate in question), conveyed the same by deed, expressing

the consideration of one dollar, to Catharine M. Brierly, in trust to receive the issues, rents and profits of said premises, and apply the same to the use of herself and Benjamin Welch Case, during their natural lives. The deed provided "that after the death of Catharine M. Brierly and Benjamin Welch Case, the premises should revert to the heirs of the grantor, in case the said Benjamin Welch Case should leave no lawful issue, but should he leave such issue, the premises should belong to them." The deed was lost soon after its delivery, but was found some years afterwards, and was recorded March 1, 1875. Catharine M. Brierly died on the 25th of September, 1870, leaving a will by which she devised her interest in the premises to Benjamin Welch Case. On the 25th of March, 1872, Nehemiah Case, as special guardian of Benjamin Welch Case, who was an infant, pursuant to an order of the Erie County Court, granted on his application, in proceedings instituted for that purpose, sold the interest of the infant in said premises and executed a deed thereof to the plaintiff, for the consideration expressed of \$2,000, which deed was recorded on the 9th of January, 1873. To secure the payment of such consideration, the plaintiff executed a mortgage on the premises, with no personal covenant, however, on his part, to the treasurer of Erie county, in trust for said infant, with interest payable semi-annually, the principal payable when the infant should reach the age of twenty-one years. The mortgage was executed pursuant to the contract of sale made in the County Court proceedings, and it contained a condition for the protection of the plaintiff against defect of title. The mortgage was recorded March 25th, 1872. The plaintiff entered on the premises soon after, and has been in possession ever since. On 15th March, 1872, Nehemiah Case and his wife executed a deed of the premises to the plaintiff, which was dated January 1, 1868, and recorded February 12, 1875. The deed last mentioned was executed to supply the lack in the title caused by the loss of the deed of July 10, 1866, and was executed for the same consideration as the deed of the special guardian. The court found that the plaintiff purchased without actual notice of any trust affecting the title, and supposing that Mrs. Brierly and Benjamin Welch Case owned the property absolutely, in fee.

The defendant Gurney claims the premises, as the purchaser, at a sheriff's sale, by virtue of an execution on a judgment against

Nehemiah Case, docketed on the 29th September, 1868. The sale was made July 2, 1874, and the sheriff gave Gurney a certificate of the sale, which was duly filed and recorded.

The court held that the plaintiff had no interest in the real estate sufficient to enable him to maintain the action.

*O. O. Cottle*, for the appellant.

*L. L. Lewis*, for the respondents.

SMITH, J.:

A question much discussed in the briefs submitted in this case, and the one upon which the court, at Special Term, is understood to have ordered a dismissal of the complaint, is, whether the plaintiff had such an estate in the land as would enable him to maintain an action to remove a cloud upon the title.

The position of the plaintiff's counsel, that his client has an estate in fee, is not tenable. He rests the claim upon the deed from Nehemiah Case, as the special guardian of Benjamin Welch Case, and also the deed executed by Nehemiah Case and wife in their own right.

The plaintiff acquired no title whatever by the deed from the special guardian. The infant, Benjamin Welch Case, had no interest in the land that could be conveyed. The deed from Nehemiah Case and wife to Mrs. Brierly created a valid trust in the grantee for the benefit of herself and Benjamin Welch Case. (1 R. S., 728, § 55, subd. 1.) The whole estate was vested in the trustee, subject only to the execution of the trust. (Id., § 60.) The beneficiaries, as such, took no estate or interest in the lands, but merely an equity to enforce the trust. (Id.) The beneficial interest of Benjamin Welch Case in the rents and profits of the lands was not assignable. (Id., § 63.) Mrs. Brierly, the trustee, had no devisable interest in the lands, and on her death, the trust estate did not pass by her will nor descend to her heirs, but the trust vested in the court, to be executed by some person to be appointed for that purpose. (Id., § 68.) It follows that Benjamin Welch Case took no estate in the land, either by the deed from Nehemiah Case to Mrs. Brierly or by the will of Mrs. Brierly; that he had no assignable

interest; that the proceeding in the County Court was a nullity, and that the conveyance from the special guardian to the plaintiff transferred nothing.

The plaintiff's claim in respect to the deed executed to himself by Nehemiah Case and wife, in their own right, is, that although such deed was subsequent in date to the trust deed, it has priority, as it was first recorded, and he purchased without notice of the trust. The court, at Special Term, found, upon sufficient evidence, that he purchased without actual notice, and we are of the opinion that he is not chargeable with constructive notice of the trust. It appears that although he was informed that Case had executed a deed, he was not told that it created a trust; that information was sufficient, however, to put him on inquiry. But the deed was lost, and there was no record of it, and he could only inquire of those who were cognizant of the transaction. The information acquired by him led him to suppose that Mrs. Brierly and Benjamin Welch Case took the property absolutely, and in fee. And as Mrs. Brierly had devised her interest to Benjamin Welch Case, the plaintiff had reason to suppose that in taking a conveyance of the interest of the latter he was getting a good title. And as an additional precaution, he took a conveyance from Case, in his own right, to supply, if possible, the missing link in the chain. These facts, which are found by the court below, show him to have used due diligence on his part, and to have failed to discover that the deed created a trust, and therefore he is not chargeable with constructive notice. (*Williamson v. Brown*, 15 N. Y., 354.) But although he had no notice of the trust, he is not entitled to priority under the recording act, for the reason that he was not a *bona fide* purchaser within the meaning of the act. He parted with nothing of value. He paid nothing at the time, and incurred no personal obligation. He gave a mortgage, without a personal covenant, on the property conveyed, for the entire purchase-price, which is not yet due, and on which he has not paid any thing except the annual interest, and for that he has received an equivalent in the possession and use of the property. It does not appear that he has expended any thing for improvements, or but that he would be in as good a position as he was in before he purchased, if the trust deed should be declared paramount to his own. Besides, the mortgage executed by him



contains a clause expressly protecting him against a defect of title. He is not, therefore, a purchaser for a valuable consideration within the meaning of the recording act, and his deed is not entitled to priority over the trust deed. (*Dickerson v. Tillinghast*, 4 Paige, 215; *Evertson v. Evertson*, 5 id., 644; *Wood v. Chapin*, 3 Kern., 509; *Pickett v. Barron*, 29 Barb., 505.) He will not be defrauded if the trust deed is to stand in opposition to his title. (Per PLATT, J., in *Dunham v. Dey*, 15 Johns., 555.)

But it is difficult to see how the plaintiff's lack of an estate in fee is available to the defendants in this action. The plaintiff is not in the position of a party suing to recover possession, who can only succeed upon the strength of his own title. The plaintiff is in possession, under a claim of title, and no one can dispossess him except the holder of the legal estate created by the trust deed. There is a class of American cases, of highly respectable authority, which hold that the actual possession of land under a claim of title, whether well or ill founded, proves or constitutes seizin in the sense of the common law. Although the point of contention in those cases was what amount of interest in the land must pass with a grant, to carry with it a covenant in the deed, yet the ruling that possession under a claim of right is an estate, is applicable to the present case. The doctrine above stated has long been held in Massachusetts. It has been adopted in this State. (*Beddoe's Exr. v. Wadsworth*, 21 Wend., 120; *Fowler v. Poling*, 2 Barb., 300; S. C., on appeal, 6 id., 166.) The Massachusetts cases, and some from other States, are cited by Hare & Wallace in their notes to Smith's Leading Cases (vol. 1, p. 157 [5th ed.]). "This course of decision," says the annotator, "gives to a wrongful possession under a claim of right the character of an estate, which, although voidable by the entry or action of the rightful owner, is, notwithstanding, actual, and will, unless avoided, ripen under the statute of limitations into an indefeasible fee." (See, also, *Craft v. Merrill*, 14 N. Y., 456.)

We are of the opinion, therefore, that the plaintiff's possession, under a claim of title, is a sufficient estate to enable him to maintain the present action against the defendants, who are strangers to the trust title, and who claim in hostility to it, provided the action can be maintained in other respects.

But we are unable to assent to the position that the acts of the

defendants, of which the plaintiff complains, constitute a cloud upon the plaintiff's title. The defendants' judgment against Case was not a lien upon the land in question, it having been docketed after the execution and delivery of the trust deed. (*Chautauqua Co. Bank v. White*, 2 Seld., 236.) The appellant's counsel is correct in his position that the trust deed divested Case of his entire estate and vested it in the trustee, and that a contingent remainder or reversion, if there had been any, could not be sold during the continuance of the trust. (*Briggs v. Davis*, 20 N. Y., 16; S. C., partly revd., 21 id., 574; *Marvin v. Smith*, 56 Barb., 600.) The facts that the deed was not recorded, and that Case was in possession when the judgment was obtained, make no difference. An unrecorded deed has preference over a subsequent judgment, and the court found at Special Term that the trust deed was executed and delivered at its date for a sufficient consideration and without intent to defraud creditors.

Neither is the judgment now an apparent lien, the trust deed being recorded. It was otherwise, perhaps, before the deed was recorded and while Case was in possession. And if the purchaser at the sheriff's sale had received a deed from the sheriff and put it on record, without notice of the trust deed, he would have been entitled to priority under the recording act. (*Jackson v. Chamberlain*, 8 Wend., 620; *Hetzell v. Barber*, decided in Court of Appeals, March 20, 1877, opinion by EARL, J.) But the plaintiff was in possession at the time of the sale, and the trust deed was recorded before the expiration of fifteen months thereafter, and consequently the judgment and the sheriff's sale and certificate (no deed having been executed), are of no avail as against the plaintiff. The defendant, Gurney, was the purchaser at the sheriff's sale, and even if he bid without notice of the trust, a deed from the sheriff to him, executed after the trust deed was recorded, would cast no cloud upon the plaintiff's right. But whether he had notice or not, a deed from the sheriff to him would cast no cloud upon the plaintiff's rights. In an action at law by one claiming under such deed to dispossess the plaintiff the trust deed would be a perfect defense. Or the plaintiff need not wait to be sued, but might institute proceedings under the statute to compel the determination of the claim made under

the sheriff's deed, in which he would have an expeditious and appropriate remedy. (2 R. S., 321; *Cox v. Clift*, 2 Comst., 118.) As the trust deed is matter of record the case should be regarded as an exception to the rule that courts of equity will give relief in cases in which it is necessary to resort to extrinsic evidence, to show the invalidity of an instrument constituting an apparent cloud on title to real estate. That rule is more especially applicable to cases where the extrinsic evidence rests in parol, and should not be extended to a case like this, where the only extrinsic evidence consists of a single deed, which is recorded in the same office in which the judgment is docketed which constitutes the alleged cloud upon the title. In *Van Doren v. The Mayor* (9 Paige, 388), Ch. WALWORTH, in illustrating the rule that a court of equity may set aside a cloud upon title to land, supposed the case of a deed procured and put upon record by fraud, or upon a usurious consideration, which requires the establishment of extrinsic facts to show the supposed conveyance to be void. PRATT, J., in *Ward v. Dewey* (16 N. Y., 522), said the rule applies to cases where the claim appears to be valid upon the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it. In *Overing v. Foote* (43 N. Y., 293) PECKHAM, J., said: "The sole point of a bill *quia timet* is to protect the owner against an illegal claim which may, in time, ripen into a right and where the evidence of its illegality is easily lost." See, also, *Farnham v. Campbell* (34 N. Y., 480).

For these reasons we think the judgment appealed from should be affirmed, with costs.

MULLIN, P. J., and TALCOTT, J., concurred.

Judgment affirmed, with costs.

WILLIAM SISSON, APPELLANT, v. ERASTUS HIBBARD AND  
OTHERS, RESPONDENTS.

*Engine and boiler — when they remain personal property after annexation to realty —  
Chattel mortgage on — effect of.*

The defendant H. purchased of M. & L., at Rochester, an engine and boiler, to be used in a business carried on by him at Barre, his purpose so to use them being known to the sellers at the time. To secure payment of the price, he gave to M. & L. a chattel mortgage upon the engine and boiler, and certain other personal property, by which they were authorized, in case of default, to enter upon the premises of the mortgagee, or any other place where the mortgaged property might be, and take possession of the property. The engine and boiler were placed in a cheaply-constructed building in such a manner as that, but for the mortgage, they would become a part of the realty. *Held*, that the engine and boiler continued to be personal property, in favor of the holders of the chattel mortgage, as against a purchaser of the land and building upon a sale under an execution, issued on a judgment subsequently recovered against the mortgagor.

APPEAL from a judgment in favor of the defendant, entered on the report of a referee.

This action was brought to recover for the alleged conversion of a steam engine and boiler. On the 24th of November, 1869, the defendant Hibbard purchased of Lamberton & Macks, at Rochester, the engine and boiler in question, on credit. The purchase was made for the purpose of furnishing power in the business of manufacturing staves and heading, which Hibbard was then carrying on, in the town of Barre. The fact that he purchased for that purpose was known to the vendors at the time of the sale. As a part of the transaction Hibbard executed to Lamberton & Macks a chattel mortgage on the engine and boiler, and other property, to secure the purchase-price. The printed case handed up to the court does not contain a copy of the mortgage, but the referee found that it conveyed the engine, etc., bought of L. & M., as aforesaid, "together with the fire kiln on which said engine and boiler might be placed when removed to the town of Barre aforesaid." He also found that the mortgage was conditioned to be void if Hibbard should pay the debt at maturity, otherwise to be an absolute transfer to L. & M., and that it authorized the mortgagees, in case of a breach of its con-

ditions, to enter on the premises of the mortgagor, or any other place where the mortgaged property might be, to take possession of it and sell it, and apply the avails in payment of the debt; and it bound Hibbard to pay the deficiency, if any. Hibbard removed the engine and boiler to Barre and placed them in a cheaply-constructed building in which he carried on said business. They were placed in the building in such a maner as that, but for the chattel mortgage, they became part of the realty. The mortgage was duly recorded, and renewed from year to year.

In the spring of 1873, Hibbard being in default, informed L. & M. that he could not pay for the engine and boiler, and it was agreed that he should give them up, but that they might remain on the premises till L. & M. should wish to remove them. On the 13th of November, 1873, Hibbard, by an instrument of sale, under seal, conveyed the engine and boiler to L. & M. In March, 1874, the defendants Clark and Crary having purchased the engine and boiler of L. and M., they and the defendant Hibbard removed them from the building. In doing so, they necessarily removed some boards from one side of the building, and partly tore down the arch surrounding the boiler. The building was inclosed with boards, and the engine and boiler could be, and were, removed without serious damage to the freehold, and without injuring or impairing their own qualities or value.

The plaintiff claims title under a judgment recovered against Hibbard, docketed 28th January, 1870. Execution was issued, and the land on which the building stood was sold by the sheriff, 15th November, 1873. The purchaser received the sheriff's deed 8th June, 1875. The engine and boiler were in the building at the time of the sale, and the purchaser forbade Hibbard to remove them. After the removal and the delivery of the sheriff's deed, the purchaser demanded possession of the engine and boiler from each of the defendants, which was refused. The plaintiff is the assignee of the purchaser at the sheriff's sale. Neither the plaintiff nor any one through whom he claims title had knowledge or notice of the agreement made between Hibbard and Lamberton & Mack in the spring of 1873, or of the subsequent instrument of sale; and the removal of the property by the defendants was without his knowledge or consent.

The referee held that the title to the property in dispute, under the chattel mortgage, is paramount to the title under the sheriff's deed, and he found for the defendants.

*W. I. Townsend*, for the appellant.

*Angus McDonald*, for the respondents.

SMITH, J. :

The referee was of the opinion that this case is controlled by the decision of the Court of Appeals in *Ford v. Cobb* (20 N. Y., 344). The appellant's counsel insists that the referee erred, and that the case of *Ford* differs from this in several essential particulars. A careful examination of the case referred to will show, I think, that the referee was clearly right. In *Ford v. Cobb*, salt kettles were bought and mortgaged to the seller as personalty. They were taken by the purchaser to his salt works and imbedded in brick arches, but could be removed without injury to them, by displacing a portion of the brick at inconsiderable expense, and the course of the manufacture required them to be thus removed and re-set annually. There was no evidence of an agreement that their character of personalty should be preserved notwithstanding the annexation, except such as was furnished by the mortgage itself and the circumstances attending its execution. The mortgage was executed at the time of the purchase. It recited the sale, and that the kettles were about to be taken to the purchaser's salt block and set up therein. The mortgagor was to remain in possession until default, unless the mortgagees should deem themselves insecure, in which case they had a right to take possession of the property and apply it to the payment of the debt. There was no express agreement in the mortgage that the salt kettles should remain personal property, as there was in the subsequent case of *Tift v. Horton* (53 N. Y., 377), which will be referred to presently. It was held by the court that the salt kettles continued personalty as against a subsequent purchaser of the salt works, who had no notice of the facts, other than constructively from the filing of the chattel mortgage. And the court reached their conclusion by adopting and applying the general rule, which is recognized and asserted in numerous other

reported cases, that the question whether an agreement, or the relation between the parties, shall preserve the character of personality in things so affixed to the freehold, as that but for such agreement or relation they would become a part of the realty, depends upon their essential character, and the mode in which they are annexed, *e. g.*, whether they can be removed without serious damage to the freehold, or substantially destroying their own qualities or value. Two propositions, then, are plainly deducible from the judgment of the court in *Ford v. Cobb*, which are applicable to the facts of the present case: 1. Chattels annexed to the realty may, by the intention and agreement of the parties, retain their character as personal property where they can be removed without substantial destruction to themselves or serious injury to the freehold; and, 2. A chattel mortgage, in the usual form, executed in view of the fact that the chattels are, or are about to be, so annexed, is sufficient evidence of such intention and agreement.

The appellant's counsel suggests that the case of *Voorhees v. McGinnis* (48 N. Y., 278, subsequently decided by the Commission of Appeals), is in conflict with *Ford v. Cobb*, and that as it is the later decision of a court of co-ordinate jurisdiction, it should control. In that case the property in dispute consisted of a steam engine, boilers, gearing, shafting, planing machines, saw benches, turning lathes, etc., connected with, and used in a grist-mill and saw-mill. The annexation to the freehold was of a much more substantial and permanent character than in the case of *Ford*, and the decision was put upon the ground that, although the owner had no special interest, the facts disclosed that the boilers, etc., were intended to be a permanent accession to the freehold, and that the execution of a chattel mortgage was not sufficient to overthrow this presumption and raise the contrary one of an intent to preserve their personal character. The manner of the annexation may be briefly stated: The boilers and engine were placed on solid brick foundations; the brick work of the foundations was carried up and laid over the body of the boilers; the bricks which covered the top of the boilers needed the boilers for a support, and would necessarily have been displaced by the removal of the boilers. The shafting and gearing was not of value, except as old material, in any other place, unless such other place, in its local arrangements, was nearly

the same as said mills. It was evidently considered by a majority of the court that the boilers, etc., could not have been removed without substantially destroying their own qualities and value or seriously damaging the freehold. In that view the decision is in harmony with *Ford v. Cobb*. But whether or not the two cases differ materially in their facts, the weight of Voorhies' case, as an authority, is lessened by the fact that it was decided by a divided court, a bare majority concurring, and the views of the minority being expressed in a carefully written and forcible dissenting opinion.

The later decisions of the Court of Appeals, to which counsel have referred, are in harmony with *Ford v. Cobb*. They are *Shelden v. Edwards* (35 N. Y., 279), *Potter v. Cromwell* (40 id., 287) and *Tift v. Horton* (53 id., 377). The latter case was like the present one, and like Ford's case, except that in Tifts' case alone, the chattel mortgage expressly provided that the chattels should remain personal property till the debt was paid, notwithstanding the annexation to the realty. That circumstance was adverted to as a clear showing of the intention of the parties in that regard, but there is no intimation, in the opinion of the learned judge, who spoke for all the members of the court, that the lack of that provision would have affected the result.

In the case of *Kinsey and others v. Bailey*, decided by this court at the term held in October, 1876, and reported 9 Hun, 452, it was held that the execution of a chattel mortgage, under circumstances substantially like those existing in this case, which mortgage contained no express provision that the mortgaged chattels should remain personal property, was of itself a clear manifestation of an intention that the character of personalty should continue, after the annexation to the realty, till the debt should be paid. In that case, there was some other evidence tending to show the intention, consisting of parol testimony to the effect that before the mortgage was executed, the mortgagee declined to advance money on the proposed mortgage, till he could take legal advice on the question whether the machinery, etc., would remain personal property, and that the mortgagors claimed to know that it would. But for that circumstance the case would have been on all fours with this, and decisive of it.

Taking, then, the law as laid down in *Ford v. Cobb*, and applying



it to the facts of the case now before us, what is the result? The annexation, in this case, was of a very unsubstantial character. The building in which the engine and boiler were placed was hardly more than a shelter to protect them from the weather. They were removed without any destruction to themselves, or serious injury to the building. The few bricks that were displaced, and outer boards that were removed, could readily be replaced at slight expense. The case was one, therefore, in which, according to the rule in *Ford's Case*, an agreement that the chattels should remain personal property would have the effect to prevent the annexation from making them a part of the realty.

Was there such an agreement? That depends on the effect to be given to the mortgage in view of the circumstances attending its execution. When the mortgage was given the mortgagor intended, as the mortgagees knew, to remove the boiler and engine to his premises in Barre, and place and use them there, as was afterwards done. The fact that the parties contemplated such removal and use of the property was referred to in the mortgage. The mortgage also authorized the mortgagees to enter on Hibbard's premises and take the property in case of default. In these respects it was almost a transcript of the mortgage in *Ford's Case*. In these circumstances the mortgage plainly manifested the intention of the parties that the property should retain its character of personalty, notwithstanding its contemplated annexation to the building and use as an apparent part of the realty. Unless the mortgage is to receive that construction it was wholly nugatory, except as a promise by the mortgagor to pay his own debt. For these reasons we think the title under the chattel mortgage should prevail.

It is said by the appellant's counsel that the defendants derive title from the bill of sale and not from the mortgage. Not so. The only effect of the bill of sale was to release the equity of redemption making the mortgage title absolute.

The judgment should be affirmed.

MULLIN, P. J., and TALCOTT, J., concurred.

Judgment affirmed.

HUN—VOL. X. 54

MARY COOK, ADMINISTRATRIX, ETC., RESPONDENT, v. THE  
NEW YORK CENTRAL AND HUDSON RIVER RAIL-  
ROAD COMPANY, APPELLANT.

*Action to recover damages for negligent killing—right of jury to allow interest—  
Chapter 450 of 1847—chapter 256 of 1849—chapter 78 of 1870.*

Although, in actions brought under the act of 1847, as amended by the act of 1849, authorizing the maintenance of actions to recover damages occurring by the death of any person by means of the negligence of the defendant, the jury, in rendering the verdict, may take into account the time that has elapsed since the death as affecting the amount of the damages, yet they cannot agree upon a certain sum as damages and add to it the interest thereon from the time of the death to the time of the rendition of the verdict.

Chapter 78 of 1870 does not affect actions brought before, though pending at the time of, its enactment.

APPEAL from a judgment in favor of the plaintiff on a verdict rendered at the Erie Circuit.

Action under the statute (Laws of 1847, chap. 450) to recover damages caused by the alleged negligence of defendant, resulting in the death of the plaintiff's intestate. The injury occurred on the defendant's railroad, at a street crossing in the city of Buffalo, on the 17th of September, 1864. The intestate died the same day. The action was brought in June, 1865, and has been tried four times. On the last trial the jury rendered a verdict for the sum of \$3,000, and interest thereon from 17th September, 1864, amounting in the aggregate to \$5,354.86, and judgment was entered for that sum, besides costs.

*A. P. Laning*, for the appellant.

*J. C. Strong*, for the respondent.

SMITH, J.:

The principal question in this case is, whether that portion of the verdict which was given by the jury as interest can be sustained. The act of 1847, which gave a right of action in cases of this nature, provided that the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from

the death, to the wife and next of kin. The amount was not limited. In 1849 the act was amended by providing that the amount of damages should not exceed \$5,000. (Laws 1849, chap. 256.) In 1870 it was further amended by enacting that the amount of damages recovered in any such action shall draw interest from the time of the death of such deceased person, which interest shall be added to the verdict and inserted in the entry of judgment.

The present action was commenced prior to the passage of the act of 1870, and was pending at that time, and consequently is not within its provisions. That act, by its express terms, did not affect any suit "theretofore" commenced. The word "theretofore," as used in it, related to the date of the amendment and not of the original act of which the amendment was made a part. (*Ely v. Holton*, 15 N. Y., 595.)

But at the trial now under review the case seems to have been disposed of, as if it were governed by the amendment of 1870. The judge instructed the jury that their verdict, if for the plaintiff, should be in such sum as in their judgment would compensate the widow and next of kin for their pecuniary loss and damage, without adding any interest to it, and he remarked, as a reason for the instruction, that the law requires the court to add the interest from the date of the death of the deceased. Neither party excepted to that part of the charge. It is apparent that the judge had reference to the provisions of the act of 1870, and was under the impression that they were applicable to the case, and it is to be inferred that his intention was not called to the fact that the suit was commenced before that act was passed.

If the jury had followed the instruction I should be inclined to hold that the parties were bound by it, they having acquiesced in it and thus made it the rule of damages for this case. But the jury did not follow it. They found first a specific sum, and to that they added interest from the day of the death and rendered a verdict for the aggregate. Their finding, so far as the interest is concerned, is contrary to the instruction, and is not authorized by the act of 1870 or that of 1847. Doubtless, under the act of 1847, the jury might have considered the time that had elapsed subsequently to the death of the plaintiff's intestate, so far as it affected the amount of damages, but they could not properly give interest as such upon the

sum fixed as damages. Interest may be allowed by a jury in certain actions sounding in tort, where the amount of damages is determinable by some definite standard, as in trover (*Hyde v. Stone*, 7 Wend., 354), trespass *de bonis asportatis* (*Beals v. Guernsey*, 8 Johns., 446) or replevin (*Rowley v. Gibbs*, 14 Johns., 385). In those cases the value of the property in controversy is the measure of damages. But in actions where the damages rest in the discretion of the jury, interest as such upon the damages cannot be recovered.

I think, therefore, that the allowance of interest by the jury cannot be sustained, and that we can only affirm the verdict to the extent of the \$3,000 damages. It is possible the jury would have fixed the damages at a larger sum if they had not supposed they could add interest. We cannot speculate on what they would have done but for such supposition on their part, and all the relief we can grant is to affirm the judgment for damages at \$3,000, if the plaintiff elects to reduce it to that sum, or if he does not so elect to grant a new trial. Some other points were argued by the appellant's counsel, but they seem to be devoid of merit.

Judgment reversed and new trial granted, costs to abide event, unless plaintiff will stipulate to reduce the damages to \$3,000, in which case judgment so reduced affirmed, with costs.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

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JANE E. MERRILL, RESPONDENT, v. THE AGRICULTURAL  
INSURANCE COMPANY, APPELLANT.

*Policy of insurance on real and personal property — condition as to incumbrances —  
policy avoided only as to the portion encumbered.*

Defendant issued a policy of insurance to plaintiff, which insured separately and in separate sums a house and barn and certain personal property belonging to her. The policy contained a condition avoiding it in case the property became incumbered by mortgage or judgment, without the written consent of the company. After the issuing of the policy plaintiff executed two mortgages upon the real estate of which no notice was given to the company. In

an action upon the policy, *held*, that though the giving of the mortgages annulled the policy as to the real estate, it did not avoid it as to the personal property.

*Trench v. Chenango Mut. Ins. Co.* (7 Hill, 122) followed.

APPEAL from a judgment in favor of the plaintiff, entered on the verdict of a jury.

The action was on a policy of fire insurance, which insured separately, and in separate sums, the dwelling-house and barns of the plaintiff, and certain personal property in each of said buildings, for three years from the 12th of April, 1873.

The answer set up, among other defenses, that, after the policy was issued, and during its continuance, mortgages on the real estate were given by the plaintiff without the consent of the defendant. The policy provided that if "the property becomes incumbered by mortgage, judgment or otherwise, \* \* \* then, and in every such case, \* \* \* this policy shall be null and void until the written consent of the company at the home office is obtained." It appeared, at the trial, that after the policy was issued the plaintiff executed two mortgages upon the real estate, one for \$4,000, and the other, as security to the mortgagee, for his indorsement of the plaintiff's paper, and there was no evidence that notice of either of said incumbrances was given to the company, or that its consent was obtained, in writing or otherwise. On this ground, among others, the defendant's counsel moved for a nonsuit. The judge held that the facts stated constituted a defense as to the buildings, but that they did not avoid the policy as to the personal property, to which ruling the defendant excepted. The jury found in favor of the plaintiff, for the value of the personal property.

*Winslow & Smith*, for the appellant. The refusal of the court to nonsuit the plaintiff upon the ground, as requested, that the creating of the mortgages to Rowland and Head vitiated the policy, and the holding by the court that the plaintiff was entitled to recover for the personal property, was error. (*Le Roy v. The Market F. Ins. Co.*, 39 N. Y., 90; *Ripley v. Aetna Ins. Co.*, 30 id., 136; *Price v. The Empire Ins. Co.*, 62 Barb., 636; *Shoemaker v. Glen's Falls Ins. Co.*, 60 id., 84; *Sansfield v. The Metropolitan Ins. Co.*, 42 How., 97; *Phillips on Ins.*, 762; *Wilson v. Herkimer Co.*

*Mutual Ins. Co.*, 6 N. Y. [2 Seld.], 23; *Brown v. People's Mutual Ins. Co.*, 11 Cush., 280; *Smith v. Empire Ins. Co.*, 25 Barb., 497; *Fire Association v. Williamson*, 26 Penn. St., 196; *Gottzman v. Ins. Co.*, 56 id., 210; *Lovejoy v. Augusta Mutual Fire Ins. Co.*, 45 Me., 472; *Gould v. York Co. Mutual Fire Ins. Co.*, 47 id., 403; *Day v. Charter Oak Fire Ins. Co.*, 51 id., 91; *Barnes v. Union Mutual Fire Ins. Co.*, id., 110; *Associate Fireman's Ins. Co. v. Assum*, 5 Md., 165; *Bowman v. Franklin Ins. Co.*, 40 id., 620; *Harman v. Hartford Fire Ins. Co.*, 36 Wis., 150; *Whitwell, as Receiver, etc., v. The Putnam Fire Ins. Co.*, 6 Lans., 166.)

*Nicholas E. Kernan*, for the respondent.

SMITH, J. :

The only question in this case that need be considered is, whether the breach of the condition respecting subsequent incumbrances avoided the policy as to the personal property as well as the realty. The case of *Trench v. Chenango Mutual Insurance Company* (7 Hill, 122), if followed, sustains the ruling at the Circuit. The correctness of the decision in that case was questioned by Foot, J., delivering the opinion of the Court of Appeals, in *Wilson v. The Herkimer County Insurance Company* (2 Seld., 53), and in *Smith v. Empire Insurance Company* (25 Barb., 497), BALCOM, J., speaking for the court, at General Term in the sixth judicial district, said that the case of *Trench* had been shaken too much by the Court of Appeals, in *Wilson's Case*, to be followed. It is by no means clear, however, that the Court of Appeals intended to overrule the case of *Trench*. The case of *Wilson* was decided in 1851. Six years later, the case of *Heacock v. The Saratoga County Mutual Insurance Company*, not reported, came before the Court of Appeals. It was an action on a policy of insurance against fire, by which the plaintiff's woolen factory, in the city of Buffalo, and the machinery therein, were insured for separate amounts. The building and machinery were entirely burned. On the trial of an action to recover the loss, before Justice SILL and a jury, the defendant proved that the title to the premises was not in the plaintiff at the time of the issuing of the policy, or at any time thereafter; also, that the plaintiff had enlarged the building and erected a new build-

ing near it. The court charged the jury that, under the proof, the plaintiff could not recover for the loss of the building, but that the fact that it appeared that the plaintiff had not the legal title to the real estate did not necessarily deprive him of the right to recover for the loss of the machinery in the building, unless the plaintiff had increased the risk by the addition to the building and the erection of the new building. The defendant excepted. The defendant asked the court to charge that if the policy was void as to the building, no recovery for any cause could be had upon it. Refused, and defendant excepted. The jury found a verdict for the plaintiff for the value of the personal property; and the judgment entered thereon was affirmed at General Term and in the Court of Appeals. (Ct. App. Cases, March Term, 1856.) That case seems to be in accordance with the decision in *Trench's Case*, and, on the whole, although there are respectable authorities on both sides of the question, in this and other States, we think the rule thus laid down must be followed by us till it is expressly reversed or overruled by the Court of Appeals. Judgment affirmed.

MULLIN, P. J., and TALCOTT, J., concurred.

Judgment affirmed.

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JACOB J. WELLER, CHARLES E. BROWN AND MICHAEL HERSEE, RESPONDENTS, v. THOMPSON HERSEE, APPELLANT.

*Covenants in restraint of trade—when valid.*

In an action by the plaintiffs to recover damages for the breach of a covenant made by the defendant whereby he bound himself not to engage in the business of manufacturing or vending cabinetware in the city of Buffalo or county of Erie, *held*, that it was incumbent upon the plaintiffs to allege facts in their complaint, showing that the covenant was founded upon a valuable consideration. *Scilicet*, that the contract is invalid when it imposes restrictions upon one party which are not beneficial to the other.

APPEAL from an order of the Erie Special Term overruling a demurrer to the complaint, with leave to answer.

The complaint claims damages for an alleged violation by defendant of a covenant not to carry on the business of cabinet-making in

the county of Erie, and also demands an injunction. The demurrer is on the ground that the complaint does not state facts sufficient to constitute a cause of action.

The alleged covenant is contained in an instrument in writing, signed and sealed by the defendant, dated the 24th of November, 1871, whereby, for value received from the plaintiffs, the defendant covenanted and bound himself to them, that he would not at any time thereafter (while the said plaintiffs, their survivors or assigns, should carry on the cabinet-making business in Buffalo) engage in the business of manufacturing or vending cabinetware in the city of Buffalo, or county of Erie. The complaint alleges that on or about the 24th of November, 1871, the defendant, who had been engaged in the business of manufacturing and vending cabinetware in the city of Buffalo, for many years theretofore, applied to the plaintiffs to purchase his stock in trade, factory and fixtures, and negotiations were entered into which resulted in an agreement, under the hands and seals of the parties, whereby the defendant agreed to sell and convey to the plaintiffs all his stock and materials, on their first paying him therefor the sum of \$100,000, and to sell and convey to them the stores which he had used in said business, for the further sum of \$50,000, on their paying \$10,000 by the 1st of May, 1872, and executing their bond and a mortgage on the premises to secure the payment of the remainder, as specified in the agreement. By the terms of the agreement the sum of \$100,000 was to be paid, and the other conditions (except with reference to the sale of the stores) were to be performed on or before the 24th of November, 1871. The last-mentioned agreement was dated the eighteenth of November. Its stipulations and conditions were fully performed as therein provided. The complaint alleges that the defendant entered into the covenant first above set forth, as a part of the consideration of the plaintiffs' said purchase.

*C. Beckwith*, for the appellant.

*J. C. Strong*, for the respondents.

SMITH, J. :

The argument of the defendant's counsel is that no sufficient consideration appears on the face of the defendant's covenant, and none is alleged in the complaint. In *Mitchel v. Reynolds*



(1 P. Wms., 181), PARKER, Ch. J., said: "In all restraints of trade, *where nothing more appears*, the law presumes them bad; but if the *circumstances* are set forth, that presumption is excluded, and the court is to judge of those circumstances and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained." In *Ross v. Sadgbeer* (21 Wend., 166), BRONSON, J., cited the language of PARKER, Ch. J., and said: "In this I fully concur. The law starts with the presumption that the contract is void, and it is only by showing that there was an adequate consideration or good reason for entering into it, that the presumption can be destroyed. The rule is, not that a limited restraint is good, but that it *may* be good. It is valid when the restraint is reasonable, and the restraint is reasonable when it imposes no shackles upon one party which are not beneficial to the other."

To the same effect are numerous other authorities, and the rule deducible from them is, that the party setting up the contract must show that it is founded on an adequate consideration, or is reasonable. It has also been held that the ordinary implication of a consideration from the *seal*, where the parties contract by deed, is not enough in cases of this kind. (*Ross v. Sadgbeer*, *supra*.)

It is necessary, therefore, in order to sustain the complaint in the present case, that it should allege or show that the covenant was made on adequate consideration, or that there was some good reason for entering into it. The complaint alleges that the defendant entered into the covenant as a part of the consideration of the purchase of the defendant's stores, factory and stock in trade. If so, there was a good reason, as well as an adequate consideration.

The appellant's counsel objects that the fact alleged cannot be proved by parol. The character of the evidence by which the plaintiffs propose to establish the averment does not appear. There is nothing in the complaint to warrant the assumption that he is not prepared to prove it by evidence in writing. The question now before the court is one of pleading, and not of evidence. The fact alleged, if proved satisfactorily at the trial, will be enough to show the contract *prima facie* valid.

It is also objected that the alleged consideration is a past and executed one, and hence will not support the covenant. This objection

rests upon the assumption that the agreement of purchase was entered into on the eighteenth of November, six days before the covenant. The presumption would be, in the absence of evidence to the contrary, that the agreement was made on the day of its date. But the complaint alleges that the application of the defendant to the plaintiff to make the purchase, which appears to have been the initiatory step in the negotiations which resulted in the sale, was made on or about the 24th of November, 1871. The plaintiffs may resort to parol proof to show the actual date of the agreement. In *Draper v. Snow* (20 N. Y., 331), SELDEN, J., delivering the prevailing opinion, said: "Whenever the time of the execution of any writing, even of the most solemn kind, becomes material, it may be proved by parol; not merely to supply an omission, where the paper itself is without date, but in opposition to the date where it contains one." The time when a contract is executed is no more a part of the contract than the place where it is executed. Both belong to that class of attending and surrounding circumstances which may always be resorted to for assistance in explaining and applying the terms of the contract." (P. 333.) If, therefore, the plaintiff should prove at the trial, under the allegation in the complaint, that the agreement was entered into at the date of the covenant, the objection now under consideration would have no force.

But upon the assumption that the agreement of purchase was signed on the day of its date, how stands the case? The agreement was wholly executory. By its terms part of it was not to be performed till the twenty-fourth of November. On that day the sum of \$100,000 was to be paid, and the personal property was to be transferred. But the plaintiffs were under no obligation to purchase the real estate. The agreement gave them the refusal till the first of May following. In these circumstances it is easy to see that the covenant of the defendant may have formed a part of the consideration of the purchase of the real estate. Order affirmed, with costs of appeal.

MULLIN, P. J., and TALCOTT, J., concurred.

Order affirmed, with costs.

ANDREW BLAZIER AND HENRY BURDEN, APPELLANTS,  
v. JACOB MILLER, RESPONDENT.

*Board of health of Syracuse — power of, to appoint inspector of milk — destruction of impure milk*

The board of health of the city of Syracuse appointed an inspector of milk, and authorized him to seize and examine all offered for sale in that city, upon having reasonable cause to believe that the same was below the standard quality of pure and wholesome milk, and to destroy the same if proved by him to be below such standard.

In an action to recover the value of milk so seized and destroyed, *held*, that the board of health had power to pass such ordinance, and that the inspector of milk was protected thereby while acting thereunder.

APPEAL from a judgment in favor of the defendant, entered on a verdict in the Onondaga County Court, and also from an order, denying a motion for a new trial on the minutes.

The action was brought originally in a Justice's Court to recover damages for unlawfully taking and detaining plaintiffs' milk wagon horse and milk cans and destroying their milk in the city of Syracuse. The defendant set up, by way of justification, an ordinance of the board of health of said city appointing him inspector of milk "with authority to seize, take into his possession and examine all milk offered for sale, or brought for sale into said city, upon having reasonable cause to believe that said milk is below the standard quality of pure and wholesome milk, and to destroy the same if found by him to be below such standard." The justice rendered a judgment in favor of the plaintiffs. The defendant appealed to the County Court where the case was tried before a jury, and the defendant had a verdict.

*R. H. Gardner*, for the appellants.

*W. E. Lansing*, for the respondent.

SMITH, J. :

The question whether the milk seized and destroyed by the defendant was pure and wholesome was litigated in the County Court, and the jury found that it was not pure and wholesome. The testimony

also warranted the conclusion that the plaintiffs brought the milk into the city for sale, and had it there for that purpose, at the time of its seizure. The defendant, therefore, was justified in taking the milk and destroying it, provided the ordinance under which he acted was valid. The plaintiffs' counsel challenges the validity of the ordinance on several grounds, the principal of which is that the ordinance violates the provision of the State Constitution, which declares that no person shall be deprived of his life, liberty or property without due process of law. (Art. 1, § 6.)

The power of the legislature to prohibit the sale of impure and unwholesome articles of food, and to provide for the confiscation and destruction of such articles on their being offered for sale in open market, cannot be questioned. Legislation of that character (of which quarantine laws, by which not only is property destroyed, but personal liberty restrained, are frequent instances) is the execution and regulation, by the body politic, of the same power of self-preservation which is possessed by individuals at common law. Its justification rests upon the immediate and imminent danger to life and health, which it is designed to avert. The statute which was condemned by the Court of Appeals, in the case of *Wynehamer v. The People* (3 Kern., 378), relied upon by the appellants' counsel in the case at bar, was of a very different character. The provisions of that act substantially destroyed, as the court held, the property in intoxicating liquors owned and possessed by persons within the State when the act took effect, without reference to the question whether such liquors were offered, or intended to be offered, for sale as a beverage. The opinions of the judges in that case present clearly the distinction between that act and statutes enacted to preserve the public health.

It has been held repeatedly, that the legislature may confer upon any department of a municipal government the authority to enact and enforce ordinances. The power results from and is incidental to its power to create and maintain municipal organizations (*The People ex rel. Cox v. The Justices of the Court of Special Sessions*, 14 S. C. N. Y. [7 Hun], 214, and cases there cited by DANIELS, J.), and the instances are numerous, in which the power has been given to boards of health, to enact and enforce such ordinances and regulations as the exigencies of the public health should appear to require.

The city of Syracuse, under its charter, has a board of health possessing all the powers and authority of boards of health in any of the cities or villages in the State. (Laws 1857, vol. 1, p. 120, chap. 63, tit. 5, § 14.) By the terms of the act for "the preservation of the public health," passed in 1850, the several boards of health in any city or village in this State have power, among other things, to make regulations, in their discretion, concerning the suppression and removal of nuisances, "and all such other regulations as they shall think necessary and proper for the preservation of the public health." (Laws of 1850, chap. 324, p. 691, § 3, sub. 3.)

It is apparent, therefore, that the subject of prohibiting the sale of impure and unwholesome milk within the limits of the city is one, concerning which the board of health of Syracuse has power to act; and that the ordinance made by them, under which the defendant seeks to justify, is valid, unless the mode of procedure which it prescribes is unauthorized and illegal. No question was made on the argument, but that the board had power to appoint an agent to execute specific duties assigned to him, provided the duties were such as the board had authority to impose. The appointment of the defendant as milk inspector is a proper exercise of the power. The ordinance authorizes the milk inspector to seize milk offered for sale, and to destroy it on finding it to be below the proper standard, without providing for notice to the owner. If the functions of the inspector were judicial in their nature, the validity of the ordinance would be questionable. It is a plain principle of justice, applicable to all judicial proceedings, that no person shall suffer judgment against him without an opportunity to be heard. (*Commissioners of Kinderhook v. Claw.*, 15 Johns., 537; *Owners of Ground v. Mayor of Albany*, 15 Wend., 374; *Elmendorf v. Harris*, 23 id., 628; *Jordan v. Hyatt*, 3 Barb., 282; *Ireland v. City of Rochester*, 51 id., 430.) But the functions of the milk inspector, under the ordinance in question, are simply ministerial. He is to destroy the milk if it is found to be below the prescribed standard; otherwise, not. In order to ascertain whether it is below the standard, he has only to measure its specific gravity by an instrument made for the purpose. He has no discretion in the matter. It is immaterial, therefore, whether the owner is present or not. If present, he could do nothing to change the result. Notice, consequently, would not

avail him, and so need not be given. (*Bouton v. Neilson*, 3 Johns., 474; *Beach v. Saunders*, 9 id., 229.) Besides, in this case, one of the plaintiffs had notice, and was present when the milk was tested. The ordinance, therefore, was valid, and was a complete justification to the defendant.

The exceptions taken at the trial to the charge of the judge, and to his rulings upon the admission or rejection of testimony, have been examined, and they present no other questions which require to be discussed.

The judgment and order of the County Court should be affirmed.

MULLIN, P. J., and TALCOTT, J., concurred.

Judgment and order of County Court affirmed.

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LEANDER W. KAUFMAN AND JOHN A. FELSINGER,  
RESPONDENTS, v. JOHN THRASHER, APPELLANT.

*Supplementary proceedings — power of referee to adjourn proceedings.*

A judge or referee in supplementary proceedings is vested with the same power of adjournment that a master in chancery had when acting under an order for the examination of a debtor in a creditor's suit, and he may adjourn the proceedings from time to time, even though the debtor to be examined refuses to consent thereto.

*The People ex rel. Williams v. Hurlbut* (5 How., 446) criticised.

APPEAL from two orders in proceedings supplementary to execution in this action, granted by the special county judge of Monroe, county directing the defendant and a witness to appear before a referee for re-examination.

On the 17th of June, 1876, upon an affidavit showing the return of an execution, unsatisfied, issued upon a judgment in the Monroe County Court, in favor of the plaintiffs against the defendant herein, the special county judge granted an order in the usual form for the examination of the defendant before a referee, Mr. Sullivan, under section 292 of the Code. On the return day of the order the defendant appeared before the referee with his attorney, Mr. Noyes,

and refused to be examined on the ground that other supplementary proceedings were pending against him, requiring him to appear at the same hour before the referee therein, who was his said attorney, Mr. Noyes; and thereupon the defendant and his attorney left the room, contrary to the direction of the referee. On the report of the referee showing these facts, and affidavits alleging that the proceedings pending before Mr. Noyes, as referee, were fraudulent and collusive on the part of the defendant, an order to show cause, etc., for contempt was granted by the special county judge, and on the return day thereof the judge made a verbal order requiring the defendant to appear before another referee, Mr. Baker, and be examined, together with any witness that might be called, concerning his property, etc., and also concerning the fraud alleged in the affidavits. The defendant appeared and was examined before the referee named in the last-mentioned order on the twenty-seventh and twenty-ninth of June, and in the course of the examination refused to answer certain questions, although directed to answer them by the referee.

The questions were these: The witness having testified that his wife had a deed of the place on which he lived, and that she advanced to him money she got from her mother, he was asked: "State, if you know, how much money your wife received from her mother?" and "State, if you know, whether your wife has owned the place since you deeded it to her?" The witness declined to answer, on the ground that his wife's property was not under examination in these proceedings." It appeared that his wife had control of the judgment against him, on which the supplementary proceedings were instituted in which Mr. Noyes was referee; that Chase & Wilcox were her attorneys therein, and that they had once been his attorneys. The witness was then asked: "How long since Chase & Wilcox ceased to act for you as attorneys, or aid you in any professional way?" "How long has Mr. Noyes acted as your attorney?" "How long have you known Mr. Noyes?" "Have you ever paid Mr. Noyes any money, as your attorney?" It appeared that shortly before the examination the witness confessed judgment to his wife for \$1,300, on which nearly all his effects were sold June twenty-sixth. The witness was asked "At whose suggestion did you confess judgment in *Thrasher v. Thrasher*?" The witness declined to answer these

several questions, on the ground that they were "foreign to this examination into defendant's property." The proceedings were then adjourned to the thirteenth of July, on the application of plaintiffs, the defendant objecting to any adjournment. In the meantime, Hannah Thrasher, the wife of the defendant, was subpoenaed by the plaintiffs to attend as a witness on said adjourned day. The parties, their attorneys and the witnesses appeared on that day, before the referee. The witness was sworn, but she refused to answer any questions, whatever, on the ground that the referee and the judge had lost jurisdiction of the proceeding, by the adjournment to July thirteenth. The parties, the witness and their respective attorneys then appeared by consent before the special county judge and submitted the matter in controversy to him, upon affidavits and upon the report of the referee showing the proceedings before him as above stated. Thereupon the judge made the orders now appealed from. One of them recited all the proceedings, including the reports of both referees, and required the defendant to appear before the original referee, Mr. Sullivan, for further examination concerning his property. The other recited the proof of service of the subpoena on Mrs. Thrasher, and the report of Mr. Baker, and directed her to appear before the referee, Mr. Sullivan, and testify in said proceedings. The defendant, alone, appeals from each order. The appeal is submitted on printed briefs.

*M. Noyes*, for the appellant.

*Fanning & Williams*, for the respondents.

SMITH, J. :

On behalf of the appellant, it is insisted that the adjournment from June twenty-ninth to July thirteenth was fatal to the jurisdiction of the referee, and also of the judge. That position seems to be advanced upon the theory, so far as can be gathered from the brief submitted to us, that a referee in supplementary proceedings has no power to adjourn without the consent of parties, except from one day to the next. The case of *The People ex rel. Williams v. Hulburt* (5 How. Pr., 446 ; S. C., 1 Code R. [N. S.], 75) is cited. In that case it was said, by JOHNSON, J., that where no consent is



given by the party against whom the proceeding is had, the judge has no more power to adjourn than a justice of the peace would have to adjourn a cause before him without the authority of the statute. The remark was a mere *dictum*, as consent was given in that case. If it is a correct exposition of the statute, neither a judge nor a referee has power, in supplementary proceedings, to adjourn even from one day to the next. That construction would produce great inconvenience in most cases, and in many would defeat the remedy intended to be given by the statute. Is not the authority to adjourn fairly to be implied from the statute? The power of a justice of the peace is hardly analogous to that of a judge or referee in supplementary proceedings. A Justice's Court is of limited jurisdiction, having no power except such as is given by statute. The proceeding supplementary to execution, though created by statute, is a proceeding in the action in which the judgment was recovered, and is a substitute for the creditor's bill formerly used in chancery. The statute creating the proceeding is not to be strictly construed. (Code, § 467.) Is it not reasonable, therefore, to hold that the judge or referee in supplementary proceedings is intended to be vested with the same power of adjournment that a master in chancery had when acting under an order for the examination of a debtor in a creditor's suit, as a necessary incident to the power of examination? The power of a referee, in this respect, is, undoubtedly, the same as that of a judge when the examination is before him. (§ 296.) Section 292, as amended in 1849, provides that upon proof, to the satisfaction of the judge, that there is danger of the debtor's leaving the State, etc., the judge may issue a warrant, and the debtor, on being brought before the judge, may be examined on oath, and if it then appears there is danger of his leaving the State, etc., he may be ordered to enter into an undertaking \* \* \* that he will, from time to time, attend before the judge as he shall direct, and that he will not, during the pendency of the proceedings, dispose of his property. This seems to imply that the judge may adjourn the examination from time to time, notwithstanding the debtor is restrained during the interval from disposing of his property. In *Ammidon v. Wolcott* (15 Abb. Pr., 314) a debtor was ordered to appear before a judge and be examined. He appeared, but the examination was suspended by

reason of his moving to vacate the proceedings for irregularity. He was also present on the hearing of that motion, and on its being denied, the examination was adjourned by the judge to a subsequent day, of which notice was given only to the debtor's attorney. It was held that on denial of the motion the judge had power to adjourn. In *Allen v. Starring* (26 How., 57) CAMPBELL, J., was of the opinion that where the parties appeared at the appointed time and place, but the referee was absent, the referee could have appointed another time for the hearing. Of course, the authority to adjourn should not be abused, nor exercised except for good cause shown by affidavit or other proof, unless proof is waived.

But it is entirely clear that if the adjournment was irregular, and the referee and the judge thereby lost jurisdiction, it was competent for the judge, upon a proper application, to grant a new order requiring the debtor to appear, to the end that his examination might be completed and that other witnesses might be examined. That was the precise nature and effect of the orders appealed from. The judge had jurisdiction to make them, all parties having appeared before him voluntarily and submitted the whole matter to his decision. It appeared by the papers submitted that the examination of the debtor had not been completed. That the questions which he had refused to answer were pertinent to the examination respecting his property is too plain to require discussion. And in view of the transactions between the debtor and his wife, as testified to by him, it was apparent that the wife was a material witness, and that to refuse to the creditor an opportunity of examining her would have been a denial of justice. The judge evidently thought it was better to again send the matter to a referee for further examination, than to punish the debtor and his wife for contempt. Of this decision, the latter, certainly, have no right to complain.

The debtor has not the right to appeal from the second order, which directs the witness to appear and be examined. It does not affect the debtor.

Each order affirmed, with costs.

MULLIN, P. J., and TALCOTT, J., concurred.

Each order affirmed, with ten dollars costs and disbursements in each.

ANSONIA BRASS AND COPPER COMPANY, RESPONDENT,  
v. S. R. PRATT, AS ASSIGNEE IN BANKRUPTCY OF HEMAN  
H. FRINK, APPELLANT.

*Assignee in bankruptcy — action by judgment creditor against, to recover value of property levied on by sheriff and delivered to assignee.*

On the 23d of June, 1873, plaintiff obtained a judgment against one Frink, and on the twenty-sixth issued an execution thereon to the sheriff, by whom a levy was made on personal property sufficient to satisfy the same. Frink having been adjudged a bankrupt in the following August, a marshal, under an order of the bankrupt court, demanded of, and received from the sheriff possession of the said property, and subsequently delivered the same to the defendant, Frink's assignee in bankruptcy. In an action by the plaintiff to recover the value of the property, *held*, (1) that the action could not be maintained as for a wrongful taking and conversion of the property, as the plaintiff acquired by the levy no sufficient title to or interest in the same to sustain such an action; (2) that it could not be maintained as an enforcement of an equitable lien, acquired by the plaintiff by virtue of his judgment, on the fund in the hands of the assignee, for the reason that the bankruptcy court alone had jurisdiction over an action of such a character.

APPEAL from a judgment in favor of the plaintiff, entered on the trial of this action by the court without a jury.

This action was brought to recover from the defendant, as the assignee in bankruptcy of Heman H. Frink, the amount of a judgment recovered by the plaintiff against said Frink on the 23d day of June, 1873, for the sum of \$346.04.

An execution on said judgment was issued to the sheriff of Jefferson county, and was by him levied on the 26th day of June, 1873, upon personal property of Frink sufficient to satisfy the execution. On the 4th of August, 1873, proceedings in bankruptcy were commenced against said Frink, resulting in his being declared a bankrupt on the fifteenth of August. On the fourth of August an *ex parte* order was issued out of the bankruptcy court, in said proceedings, restraining the sheriff from disposing of said property levied upon by him, until the further order of that court. Thereafter a warrant was issued to the marshal to take possession of the bankrupt's property, and the marshal, by virtue thereof, demanded possession of the property held by the sheriff under said levy, and the sheriff

thereupon delivered to the marshal the keys of the store in which the property was contained, and the marshal took possession of the property. The marshal subsequently turned over the property to the defendant herein as assignee in bankruptcy, who sold the same, and took the proceeds as assignee.

The cause was tried at the Jefferson Circuit, without a jury.

The judge found that the plaintiff is entitled to recover against the defendant the amount due upon the judgment, besides costs.

*S. R. Pratt*, appellant, in person.

*M. P. Stafford*, for the respondent.

SMITH, J.:

If this action is regarded as sounding in tort, for an alleged wrongful taking and conversion of the personal property in question, it is difficult to see how it can be maintained. The plaintiff had no title to, or interest in the property of Frink, by virtue of the levy, which would sustain the action. The property, when levied on, was in the custody of the law, and the sheriff was the only party who could recover for a wrongful taking while the levy was in force. (*Barker v. Mathews*, 1 Den., 335; *Skinner v. Stuart*, 39 Barb., 206.) The sheriff is responsible to the plaintiff for the value of the property levied on under its execution. It is no defense to the sheriff that the property was wrongfully taken from his custody by a third person. For such taking the sheriff may have his action against the wrong-doer, and thus indemnify himself. This court held recently in an action by the plaintiff herein against the sheriff, growing out of this very transaction, and on the same facts, that the sheriff was liable to the plaintiff for releasing the property in question and turning the same over to the marshal. (8 Hun, 157.)

The counsel for the respondent insists that the want of title in the plaintiff is not now available to the appellant, as the point, he says, was not taken at the trial. If it had been, he suggests it might have been obviated by showing that the plaintiff sued at the request of the sheriff.

It is, undoubtedly, a well-settled rule, that when a motion for a nonsuit is made, without stating the grounds of it, mere formal

objections, which were not brought to the notice of the court, and which might have been obviated if attention had been called to them at the trial, will not avail on appeal from the decision refusing a nonsuit. (*Castle v. Duryea*, 32 Barb., 480; *Binsse v. Wood*, 37 N. Y., 526; *Mallory v. Travelers' Insurance Co.*, 47 id., 52.) Here, however, the objection goes to the very foundation of the action. Proof that the plaintiff sued at the request of the sheriff would not have helped the case. Such request would not have transferred the right of action. Where the objection is of such a nature that it cannot be obviated, the rule adverted to does not apply. (*Delafield v. State of Illinois*, 2 Hill, 159; *Cook v. Whipple*, 55 N. Y., 157.) But in the present case, the grounds of the motion for a nonsuit were specified. The record states that the defendant's counsel moved for a nonsuit "on the ground that the plaintiff had failed to establish a cause of action against this defendant; that there is no proof that the notice of twenty days to the assignee in bankruptcy before bringing suit has been served on the assignee, as required by the provisions of the bankrupt act; and, also, that this court has no jurisdiction to entertain this action." The first ground was broad enough to include the objection now under consideration. It may admit of question whether it was sufficiently specific, although the statement of the other two grounds necessarily confined it to limits not occupied by them. But it appears, by the statement of the reasons given by the judge for his decision, that his attention was called to the point, and that he was of the opinion that the sheriff held the goods as the agent of the plaintiff in the execution, and that his special interest in them inured to the benefit of the plaintiff. It is manifest, however, that, in the hurry of the Circuit, the learned judge fell into an error in that particular, and that if the plaintiff's action rests upon no other ground than a wrongful taking and conversion, it must fail.

Another objection to the action, as one sounding in tort, is, that the taking was not wrongful. The sheriff voluntarily delivered the property to the marshal, and the marshal turned it over to the assignee. The sheriff was under no obligation to part with the property. On the contrary, it was his duty to resort to all reasonable means to protect his levy. This point was adjudged in the case of this plaintiff against the sheriff, above referred to. The

defendant, therefore, was not chargeable with a conversion unless he refused to give up the property, or its proceeds, after demand, and of that there is no evidence. This point, however, was probably waived by the omission to take it at the trial.

The only other view that can be taken of the nature of the action is, that it has for its object the enforcement of the lien which the plaintiff has, by virtue of its judgment, on the fund in the hands of the assignee. In that aspect of the case, the difficulty is, that a State court has not jurisdiction of an action to enforce and liquidate a lien upon a fund in the hands of the bankruptcy court. In this case, the fund is the proceeds of property which was voluntarily surrendered to the marshal by the sheriff. As we have seen, the plaintiff has its right of action against the sheriff. If it has also a lien on the fund in the hands of the assignee (a question which, in our view of the case, it is not necessary to decide), such lien can only be enforced in the court in which the bankruptcy proceeding is pending. (Bankrupt Act of 1867, § 57.) In *Havens v. National City Bank of Brooklyn* (13 N. B. R., 95) it was held, by the General Term of this court in the second department, that no State court can require a bank, in which the funds belonging to a bankrupt's estate are deposited to the credit of the assignee in bankruptcy, to pay a judgment against the assignee of such bankrupt out of such funds. The fund is in the bankrupt court to be disposed of by order of that court. If these cases were correctly decided, this court would have no power to execute the judgment appealed from, if it should be allowed to stand. It has been held, in some of the federal courts, that an assignee appearing without objection in an action, brought in a State court, to enforce a lien upon the property of a bankrupt, cannot be heard on appeal to object to the jurisdiction. As, for instance, where the assignee appeared in an action to foreclose a mortgage, and made a contest for the surplus. (*Mays v. Fritton*, 11 N. B. R., 229; S. C., 20 Wall., 414.) But unless an assent thereto shall first be given by the assignee, as an officer of the court, no person can enforce a specific lien, such as a mortgage or a judgment in a State court, while proceedings in bankruptcy are pending. (*In re Brinkman*, 7 N. B. R., 421; *Augustine, Assignee, v. McFarland*, 13 id., 7; *Brigham v. Claffin*, 7 id., 412, decided by the Supreme Court of

Wisconsin.) The rule is well stated by the Supreme Court of North Carolina, SETTLE, J., in these words: "The bankrupt law does not divest a lien, but as all the property of a bankrupt, as well that subject to mortgages and liens as that which is unincumbered, passes to the assignee, and is in *custodia legis*, subject to priorities and liens, it follows that the bankrupt court is the proper tribunal in which to administer the remedies for the enforcement of liens. The State courts may be employed to collect the assets of a bankrupt, and also to ascertain the liens which may exist on such assets; but it is one thing to ascertain a lien, and quite another to liquidate it." (*Blum, Ex., v. Ellis*, 13 N. B. R., 345.)

We are of opinion that the objection to the jurisdiction of this court is well taken, and that it is fatal to the action against the assignee, whether it be regarded as an action to enforce the specific lien of the judgment on the fund in his hands, as the officer of the bankruptcy court, or to compel payment, out of the fund, of the damages resulting from the alleged wrongful conversion

In any view of the action, therefore, we think it cannot be maintained.

Judgment reversed and new trial ordered, with costs to abide event.

MULLIN, P. J., and TALCOTT, J., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

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JOHN F. HAGER, JR., AND OTHERS, PLAINTIFFS, v. GEORGE M. CLUTE AND JOHN HOLSINGER, DEFENDANTS.

*Action of replevin—judgment in—liability of sureties upon undertaking given in.*

Where, in an action of replevin, the plaintiff recovers a judgment for the possession of the property with damages for its detention, and for a fixed sum in case a return cannot be had, he cannot maintain an action against the sureties to an undertaking, given by the defendant, in pursuance of section 211 of the Code, until an execution has been issued to the sheriff in pursuance of the judgment and the same has been duly returned unsatisfied.

MOTION by defendants for a new trial on exceptions taken at the Erie Circuit, and ordered to be heard at the General Term in the first instance.

This action is brought upon an undertaking executed by the defendants, under the following circumstances: The plaintiffs in this suit instituted an action to recover the possession of specific personal property, and claimed its immediate delivery. The sheriff took the property, but before it was delivered to the plaintiffs the defendant in that action gave to the sheriff the undertaking in suit, executed by the present defendants, in his behalf. The undertaking is in the form prescribed by section 211 of the Code. Thereupon, the property was returned to the defendants. The plaintiffs recovered judgment in the alternative for the possession of the property, with fifty dollars damages for the detention, or for \$207, together with fifty dollars damages in case a delivery could not be had, and for thirty-three dollars and eighty cents costs. No execution has been issued on the judgment.

A verdict was rendered in this action, by direction of the court, in favor of the plaintiffs, for \$313.08.

*S. S. Rogers*, for the defendants.

*Lewis & Gurney*, for the plaintiffs. It is not necessary for the plaintiff in a replevin suit to issue an execution, and exhaust his remedy by execution before he can bring his action. (Thompson on Provisional Remedies, fol. 187, § 11; *Slack v. Heath*, 4 E. D. Smith, 95, affirmed, Ct. of App., June, 1860; *Marange v. Mudge*, 6 Abb., 243; *Livingston v. Hammer*, 7 Bosw., 671, 677; *In the Matter of Negus*, 7 Wend., 499; *N. Y. C. Ins. Co. v. Safford*, 10 How., 347; *Ball v. Gardner*, 21 Wend., 270; *Harris v. Hardy*, 3 Hill, 393.)

SMITH, J.:

By the terms of their undertaking the defendants became bound for the delivery of the property to the plaintiffs, if such delivery should be adjudged, and for the payment to them of such sum as might for any cause be recovered against the defendant in the action. The obligation created by the undertaking to pay "such sum as might be recovered" is an obligation to pay according to the terms and conditions of the recovery, and not otherwise. Section



277 of the Code provides that "in an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof, in case a delivery cannot be had, and of damages for the detention." The judgment in this case is in accordance with that provision, and it adjudges that the defendants pay the value of the property *in case a delivery cannot be had*. The recovery for the value is not absolute, but conditional, and until the condition is complied with, the defendants are not liable for the value. To satisfy the condition it must appear that a delivery cannot be had by the ordinary process of law. The proper evidence of the fact is the issuing of an execution as prescribed by the Code (§ 289, subd. 4) and a return that delivery cannot be made. Section 211 is to be read in connection with section 277, and parties entering into an undertaking in pursuance of the former section are presumed to do it in view of, and with reference to, the provisions of the latter. Being sureties, they cannot be charged beyond the fair import of their undertaking. (*McCluskey v. Cromwell*, 11 N. Y., 593; *Wood v. Fisk*, 63 id., 245.)

These views are sustained by the cases of *Gallarati v. Orser* (27 N. Y., 324) and *Fitzhugh v. Wiman* (5 Seld., 559). *Gallarati's Case* was this: The defendant in replevin, on being arrested, had given an undertaking, as provided by sections 187 and 211, and was discharged by the sheriff. Subsequently, his sureties being excepted to, had failed to justify. The plaintiff recovered, and entered a judgment for the value only, and not for the delivery of the property, and for its value if a delivery could not be had. Execution was issued in accordance with the judgment for the assessed value of the property, absolutely, and not contingently upon the inability to have a delivery of it. The execution was returned unsatisfied, and the plaintiff sued the sheriff, claiming that he was liable in the same manner as the sureties on the defendant's undertaking to him. The Court of Appeals assumed, for the purposes of the case, that the sheriff was liable precisely as the sureties would have been if a proper undertaking had been given; but the court held, reversing the judgment of the court below, that the sheriff was not liable, and that to render him liable there must be a judgment, under the execution on which, the property might be sought and delivered.

In *Fitzhugh v. Wiman* the court decided that in an action to recover the possession of personal property, where the property has not been delivered to the plaintiff prior to the trial, the plaintiff recovering has not a right to elect to take judgment for the value, but is entitled only to a judgment in the alternative.

In the present case, the plaintiff has entered judgment in the proper form, but he has not sought to enforce it by execution. That the issuing and return of a proper execution are as essential as the entering of a proper judgment to complete the liability of the bail, or of the sheriff, as the case may be, is apparent from the reasoning of the court in *Gallarati's Case*. DENIO, J., delivering the prevailing opinion, said: "We cannot say but if a proper judgment, and an execution in conformity with it, had been issued, the bail or the sheriff would have found the property, and have caused it to be taken and delivered to the plaintiff on the writ of *retorno habendo*." (P. 327.)

The cases of *Slack v. Heath* (4 E. D. Smith, 95; 1 Abb., 31) and *Livingston v. Hammer* (7 Bosw., 671), cited by the plaintiff's counsel, do not touch the point in question. In *Slack v. Heath*, a verdict was ordered for the plaintiff on the pleadings. The complaint alleged an undertaking and a recovery in the replevin suit, but the form of the judgment did not appear, nor was it shown whether there had been an execution issued. The question most considered on the appeal was, whether the complaint averred a sufficient consideration to support the undertaking.

*Livingston v. Hammer* came before the court on a motion for judgment on account of the frivolousness of the answer. A question was made as to the sufficiency of the complaint. It alleged an undertaking in replevin under section 211, and a judgment in the action for the value simply. The court decided that if the judgment was not in the alternative, it was irregular merely, and not void; and that the irregularity could not be taken advantage of in an action on the undertaking. The only authority cited was *Gallarati v. Orser* (4 Bosw., 94), which, as we have seen, was afterwards reversed.

The counsel for the plaintiffs insists that he was entitled to maintain the action for the damages and costs given by the judgment, if not for the value, as the judgment for them is absolute, and, there-

fore, the defendants' counsel asked for too much, and his motion for a nonsuit was properly denied. The position may be correct, but it does not appear to have been suggested at the trial. The case was evidently tried and decided upon the theory that the plaintiff was entitled to recover the value as well as the damages and costs. The court directed a verdict for a specific sum, which included the value, and to that direction the defendants' counsel excepted.

New trial granted, costs to abide event.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

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DAVID S. BENNETT AND HARRIET A. BENNETT, PLAINTIFFS, v. LAVINIA H. AUSTIN, IMPEADED, ETC., DEFENDANT.

*Motion for a new trial, after interlocutory judgment—Appeal need not be taken—Code, § 268.*

After the entry of an interlocutory judgment or decree, not authorizing a final judgment, but directing further proceedings before a referee or otherwise, a motion for a new trial, on a case and exceptions, may be made under section 268 of the Code, without taking any appeal from such judgment or decree.

*Semble*, such motion cannot be made in case of a trial before a referee.\*

Such motion does not stay proceedings under the interlocutory judgment or decree.

MOTION to strike this case from the calendar, on the ground that the court had no jurisdiction to hear and determine the same.

This action was commenced to redeem certain lands conveyed by the plaintiffs to one Stephen G. Austin, on the ground that the deed was a security for a loan.

Austin died, and his wife was made a party defendant to this action.

The action has been twice tried. The second trial was had before Judge Henderson, who found the facts as alleged in the complaint,

\* Under section 1001 of the Code of Remedial Justice (Laws of 1867), such motion may be made in case of a trial before a referee.

and decided that the plaintiffs had a right to redeem the said premises and directed an accounting as to the rents and profits received by Austin during his life, and by his wife since his decease.

Without taking any appeal from this decision, and after the time had elapsed from taking an appeal therefrom, the defendant's counsel gave notice of a motion for a new trial on a case and exceptions.

*Wm. H. Greene*, for the plaintiffs.

———, for the defendant.

SMITH, J.:

We do not assent to the position of the plaintiffs' counsel that an appeal must be brought, in order to move for a new trial under the provision of section 268 of the Code, which was introduced into that section by the amendment of 1867. (Laws 1867, ch. 781, § 9.) Prior to the adoption of that amendment, there was no mode of reviewing the decision upon a trial by the court, except by appeal from a final judgment. On such appeal any intermediate order, involving the merits, and necessarily affecting the judgment, might be reviewed. (Code, § 329.) That state of the practice led to much delay and inconvenience in a considerable class of cases tried by the court, in which, after the decision of the preliminary issue, an accounting or some other further proceeding was necessary before final judgment could be rendered, and which subsequent proceeding could be had more conveniently before a referee than before the court. To remedy that inconvenience, the amendment of 1867 was adopted, providing a motion for a new trial on a case and exceptions, whereby the interlocutory decision of the court could be reviewed, before judgment. The motion is not an appeal, but it must be brought on, upon a case or exceptions made as provided "in case of an appeal."

It was suggested, on the argument of this motion, that an appeal is necessary to bring the case up for review. But the statute directs that the motion shall be made at General Term, and as it is to be made on a case, and as a final judgment is not to be rendered by the General Term, the record need not be brought up.

It was also urged that unless a party proposing to move for a new

trial, under section 268 is required to bring an appeal, the party prevailing at the Special Term, will be subjected to delay till the decision of the motion for a new trial, without having security. The motion for a new trial does not stay proceedings. The prevailing party may proceed with the cause, notwithstanding the steps taken with a view to a motion for a new trial, unless he is stayed by an order of the court, or a judge thereof, on the granting of which order, such terms may be imposed as shall appear just, respecting security or otherwise.

The case of *Miller v. Lansing*, decided by this court in June last, is distinguishable from this. There the trial was before a referee, and we refused to hear a motion for a new trial on a case and exceptions, for the reason that the provision of section 268, in question, does not apply to the case of a trial by a referee. The inconvenience above adverted to, attending the taking of an account, or other further proceeding, in an action tried by the court, does not exist in the case of a trial by a referee, who can as conveniently take the account as he can try the main or preliminary issue. The only mode now, as well as before the amendment of 1867, of reviewing the decision of a referee, is by appeal from the final judgment.

Motion denied, but without costs, as the question of practice is new.

MULLIN, P. J., and TALCOTT, J., concurred.

Motion to strike cause from the calendar denied.

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JOHN UNDERWOOD, RECEIVER, ETC., RESPONDENT, v. WILLIAM SUTCLIFFE, IMPEADED, ETC., APPELLANT.

*Supplementary proceedings — receiver in — powers of — irregularity in appointment of — who may take advantage of.*

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A receiver appointed in proceedings supplementary to execution, may maintain an action to recover real or personal property transferred by the judgment debtor in fraud of his creditors.

No person can avail himself of an irregularity in the proceedings in which the receiver was appointed, except the judgment debtor himself.

Proceedings supplementary to an execution are in the nature of an action, and the court does not lose jurisdiction thereof, by a failure of either or both of the parties to appear on a day to which they have been adjourned by the judge or referee.

Where, in such a case, the attorney for the judgment debtor appears before the judge, in obedience to a notice to show cause why a receiver should not be appointed, and makes no objection thereto, all objections to the regularity of such proceedings are thereby waived.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

In March, 1871, Charles T. Ferris recovered a judgment in this court against Henry C. Sutcliffe for the sum of \$836.48, damages and costs.

In 1873, said Ferris having issued execution on said judgment, and it having been returned by the sheriff to whom it was delivered, unsatisfied, instituted proceedings supplementary to execution before the county judge of Cayuga county, against the judgment debtor, who appeared before the referee appointed therein, from time to time, and was examined touching his property. The last adjournment was to the 12th of November, 1873. On that day neither party appeared before the referee, and he closed the evidence.

On the 9th of February, 1874, the county judge appointed the plaintiff in this action receiver of the property and effects of said Henry C. Sutcliffe, upon his filing with the clerk of said county a bond, with sufficient sureties, to be approved by said county judge, in the penalty of \$500 for the faithful discharge of the duties of the trust.

The plaintiff, with two sureties approved by the said judge, executed a bond in conformity to said order, dated the 5th of February, 1874, and thereupon entered upon his duties as receiver, under and pursuant to said order.

In April, 1874, the receiver commenced this action against the judgment debtor and William Sutcliffe, his son, alleging in the complaint, amongst other things, the recovery of said judgment, and that said Henry C. had been engaged for several years as a maltster, and had made large profits in that business; that in January, 1867, and while he was owing said Ferris the debt for which judgment was afterwards recovered, he, desiring to enlarge his business,

and intending to cheat and defraud said Ferris, purchased, or caused to be purchased by his son, William, the other defendant in this action, a lot of land of one David Wetherby, contiguous to his place of business; caused the title to said lot to be conveyed to said William, the purchase-money having been paid by or out of the property of said Henry C.; that the conveyance to said William was fraudulent as against the creditors of Henry C. After said conveyance, William caused to be erected on said lot a malt-house, at an expense of some \$6,000, which was paid with the money or property of said Henry C.; and that the business of malting thereafter done in said building was done in the name of William, but for the benefit of said Henry C. And that Henry C., in order to cheat and defraud his creditors, and especially said Ferris, transferred all his property to said William, and thereafter all the business was done in his name; that said Henry has continued to carry on the business as before the transfer to William, purchasing and selling property in his own name.

The plaintiff demanded judgment, that said judgment and the costs be declared a lien on said premises so held by said William, and that the conveyance to him be declared fraudulent and void; and that the transfer to William of the personal property be also declared fraudulent and void, and set aside as against such judgment and costs.

Henry C., in his answer, admits being engaged in making beer from 1861 to 1868; that judgment was recovered against him by Ferris; alleges that in May, 1868, he ceased to carry on said business; and denies all allegations of fraud in said complaint, and denies all other allegations in the complaint.

The defendant William, in his answer, denies that Henry C. purchased the land on which the malt-house was erected, or that it was paid for by his means, or that he ever had any interest in said property. He also denies that Henry C. paid any part of the expense of erecting said malt-house, or that said purchase was made with any fraudulent intent.

William also denies that Henry C. has had any interest in the business carried on by said William, and that any property was transferred to him with fraudulent intent. He sets up, in bar of said action, the statute of limitations.

The cause was tried at the Auburn Special Term, in March, 1875, before Justice DWIGHT, who found, amongst other facts, that while the action of Ferris against Henry C. was pending, the malt-house lot was conveyed by Wetherby and wife to defendant William; that the consideration was paid with the money of said Henry C., and the conveyance taken in the name of William for the purpose of preventing and hindering said Ferris in collecting his demand; that in 1868, and while the action of Ferris was pending, the defendant erected a malt-house upon said premises, at a cost of at least \$6,000, \$1,500 of which was furnished by the wife of said Henry, and the balance was paid with the moneys of said Henry, and out of the avails of said business; and that the said conveyance was made to said William for the purpose of delaying and defrauding the creditors of Henry C., and especially Ferris.

The said justice ordered judgment that said conveyance to William was fraudulent as against Ferris; and that the same, with the building thereon, should, in equity, be subject to said judgment, and to the costs of the action and of the supplementary proceedings.

From that judgment the defendant William appeals.

*E. H. Avery*, for the appellant.

*F. D. Wright*, for the respondent.

MULLIN, P. J. :

The appellant's counsel moved for a nonsuit on the trial, on the ground, among others, that the plaintiff was not legally appointed receiver of the property of the judgment debtor, for the reason that on the day to which supplementary proceedings were adjourned by the referee neither party appeared, and the plaintiff thereby abandoned the proceedings, and the county judge could not thereafter appoint a receiver.

With the proceedings to appoint the receiver the appellant has nothing whatever to do. The judgment debtor is the only person who can avail himself of any irregularity in the proceedings, and in this case he concedes their regularity by not questioning them. (*Tyler v. Willis*, 33 Barb., 327; *Hobart v. Frost*, 5 Duer, 672.)

Proceedings supplementary are in the nature of an action, and do



not terminate by the neglect of the plaintiff in the judgment, to appear on a day to which they have been adjourned, either by the judge or referee. But it would be irregular to proceed upon the original order after such failure to appear, and the subsequent proceedings would be set aside on motion or on appeal. Jurisdiction of the officer continues until the judgment is satisfied or the proceedings terminated by order of the judge or of a competent court.

The right of the plaintiff to maintain the action is denied upon the further ground, that the receiver's bond is dated several days before the order appointing the receiver was made.

It appears by the evidence of the referee that the attention of the judge was called to the defect, if it was one; but it would seem that the bond was not received or acted upon until after the appointment of the receiver, and it then became operative against the parties to it, and they are estopped from disputing its validity.

But the conclusive answer to the objection is that the appellant has no right to raise the objection. The judgment debtor alone could raise it.

Again, it appears by the case that the attorney of the judgment debtor appeared before the judge, in obedience to notice to show cause why a receiver should not be appointed, and made no objection to the appointment, and all objections to the regularity of the proceedings were thereby waived. (*Tyler v. Willis*, 33 Barb., 327; *Viburt v. Frost*, 3 Abb., 119.)

Another ground of nonsuit relied upon by the appellant's counsel was, that there was no evidence in the case that the conveyance from Wetherby to appellant was taken in the name of the latter for the purpose of preventing and hindering Ferris from collecting his debt from Henry C. Sutcliffe.

It is impossible, it seems to me, to read the evidence of the appellant and not be satisfied that not only the land in question, but the entire property of the judgment debtor, and all the profits of the business previously carried on by his father, were transferred to the appellant without consideration, and that the improvements made upon it were paid for from the profits of the business.

The appellant was a young man, unmarried, lived at his father's, and was boarded by him without charge, worked at the business at his pleasure, without any contract as to price, and took to his own

use and deposited in bank or kept in a trunk belonging to him so much of his father's money arising from the business as he desired, and so much as he desired to pay out for his personal expenses, without investing a dollar in the business except some \$1,500 he got from his mother, all the rest being obtained from his father. He became the owner of a large and valuable property, leaving not a dollar with which to pay his father's creditors. If such a transaction is not fraudulent, I am unable to imagine a case that would be.

The findings of the court are fully sustained by the evidence.

If it was necessary, in order to support the judgment, to lay one's finger on the evidence in which the appellant testifies that the transactions between him and his father were fraudulent as to the creditors of the latter, it must be conceded there is no such evidence. But taking the history of appellant's connection with his father's business and the absorption by him of the whole property without consideration, and without leaving any thing for his father's creditors, the evidence of fraud thus obtained is not only more conclusive, but more satisfactory than any direct admission of the appellant could be. The one might be the result of surprise or mistake, but the other cannot be.

The appellant's counsel insists that the receiver cannot maintain this action to satisfy the Ferris judgment out of the property obtained by appellant from his father, because his authority is limited to the property which passes to him from the judgment debtor, and cannot reach the land conveyed by Wetherby or the proceeds of it, or of the improvements made thereon.

A receiver appointed in proceedings supplementary to execution may maintain an action to recover real or personal property transferred by the judgment debtor in fraud of his creditors. (*Porter v. Clark*, 12 How., 107; S. C., 5 Seld., 142; *Edmonston v. McLoud*, 16 N. Y., 543.)

The parties to the fraud cannot cover the property so that it cannot be reached by the receiver by causing it to pass through numerous hands by numerous conveyances.

The judgment of the Special Term must be affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed, with costs.

## JACIN L. HIGGINS, RESPONDENT, v. THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

*Policy of insurance — application for — erroneous answer — Conversation between applicant and agent — admissible in evidence — when company estopped from setting up falsity of answer.*

Plaintiff's assignor having applied for a policy of insurance, the application was filled up by the defendant's agent. The answer to a question as to the name and residence of his family physician was, "Refer to Dr. A. T. Mills, Corning, N. Y." Accompanying the application was a paper headed "Questions to be answered by the physician of the party to be insured," signed by Mills, in which he stated that he never attended Higgins professionally.

Upon the trial of this action, brought to recover on the policy, defendant insisted that it was void, for the reason that Mills was not, but that a Dr. Bryan of Corning was the family physician of the insured. Against defendant's objection and exception defendant's agent was allowed to state that at the time of the filling up of the application, Higgins said he did not know as he had any one that he could call his family physician; that Dr. Mills had prescribed for him, and that Dr. Bryan had prescribed for him, and he would refer to either of them. The agent asked if he should put down his reference to Dr. Mills, and he said "yes." *Held:*

- (1) That the answer being ambiguous *parol* evidence, as to what took place at the time, was properly admitted.
- (2) That as Higgins was misled by the agent into making an erroneous reference to Mills, the company was estopped from insisting thereon.

APPEAL from a judgment in favor of the plaintiff, entered upon a verdict directed by the court.

The action was brought to recover the amount of a policy of insurance, issued by the defendant upon the life of one Romeyn O. Higgins, which had been assigned to the plaintiff.

*Samuel Hand*, for the appellant.

*Bradley & Kendall*, for the respondent.

MULLIN, P. J.:

On the 2d January, 1873, Romeyn O. Higgins applied to William Walker, an agent of the defendant, residing at Corning in the county of Steuben, for a policy of insurance on his life in said company, for the sum of \$5,000. The agent wrote the answers of Hig-

gins to the several questions required to be answered by all persons applying for insurance in said company. The application was signed by said Higgins, and it, with other papers required to be furnished to the company by applicants for insurance, were forwarded to the defendant by said agent, and a policy was thereupon issued to said Higgins, insuring his life in the sum of \$5,000, and was dated the 31st December, 1872.

Said policy contained the following, amongst other conditions: "If any of the declarations or statements made on the application for this policy, upon the faith of which this policy is issued, shall be proved in any respect untrue, this policy shall be null and void."

The application required Higgins to state the name and residence of the family physician, or of one whom the party has usually employed or consulted.

The answer to the question was as follows: "Refer to Dr. A. T. Mills, Corning, N. Y."

Accompanying the application, sent by Higgins to the defendant, was the certificate of Dr. A. T. Mills, at the head of which were the following printed words, viz.: "Questions to be answered by the physician of the party to be insured."

Dr. Mills, in his answer to the questions required to be answered by him, stated that he had known Higgins two years, and that he had never attended him professionally.

The insured died, on or about the 15th October, 1873, and the requisite proofs thereof were furnished to the defendant. The defendant refused to pay the amount insured, and thereupon this action was brought.

The defendant, in its answer, set up as a defense the falsity of the answer to the twenty-sixth interrogatory, contained in the application, by reason of which the policy became void.

On the trial, Dr. Mills was called as a witness on the part of the defendant, and testified that at the time he examined Higgins, in order to ascertain whether he was a proper subject for insurance, he had never prescribed for or attended his family at his house. On two occasions he had prescribed for him, when he met him on the cars, for dyspepsia, and for which he made no charge. Proof was given, tending to prove that Dr. Bryan, of Corning, was the family physician of Higgins.

William Walker, defendant's agent, who took and forwarded Higgins' application for insurance to defendant, was called by the plaintiff and the following question was put to him: "When that question (No. 26) in the application was read to Higgins, at the time the application was made, what was said and what took place in regard to it?"

The question was objected to as incompetent and immaterial on several grounds. The objection was overruled, and defendant's counsel excepted. The witness testified that he (Higgins) said he did not know as he had any one that he could call his family physician; that Dr. Mills had prescribed for him, and that Dr. Bryan had prescribed for him, and he would refer to either one of them. The agent asked him if he should put down his reference to Dr. Mills and he said "yes." That was about all that took place in reference to that, and he (the agent) thereupon wrote it in its present shape.

The court ordered a verdict in favor of the plaintiff for \$5,000 and interest thereon, to which direction defendant's counsel excepted.

Higgins' answer to the twenty-sixth interrogatory is not such a direct and unequivocal answer, as the company had the right to demand, and as the assured was bound to make. It would, under ordinary circumstances, be received as an allegation that Dr. Mills was his family physician, but connected with the application was the certificate of Dr. Mills that he had never attended Higgins professionally.

This certificate cannot overcome the effect of a positive statement in the application that Dr. Mills was the family physician of Higgins, but it is to be considered in determining what weight is to be given to the peculiar answer of Higgins as to who was his family physician, and made it proper to inquire of the agent what was said at the time of preparing his answers to the interrogatories, as to who was his (H.'s) family physician.

In the case of *Baker v. The Home Life Ins. Co.*, not yet reported, ALLEN, J., says: "If true answers were given to the agent of the defendant by whom the application was filled out and the answers reduced to writing, but the agent for any reason modified or varied the answers so as give them a different meaning from the answers actually given by the applicant, the defendant would be estopped from challenging the correctness of the answers as modified and

written by the agent. In such case the answers nominally proceeding from the insured would be regarded as the act of the insurers. They must be held estopped by the acts of the agent sent out by them to solicit insurances, and if such agents, by reason of the large commissions upon the premiums they obtain, and a desire to extend and enlarge the business of their principals, are officiously zealous and take the liberty of interpreting and giving form to the answers and statements of those whom they are soliciting to take policies, instead of giving literally the statements and words of the applicant, the effect must be the same as if the same acts had been done by the insurers in person. The agents, in the matter of the application and all they do before the issuing of the policy, are the accredited agents of the company, acting within the apparent scope of their authority, and are so regarded by those whom they approach, and with whom they deal in respect to insurance, and it would be unjust to treat them as the agents of the applicant."

It follows, from these views of the learned judge, that it was competent for the plaintiff to prove by parol what he said to the agent in answer to the twenty-sixth interrogatory.

Higgins told the agent that he did not know that he had any one he could call his family physician; that both Mills and Bryan had prescribed for him, and he would refer to either. The agent then asked him if he should put down his reference to Dr. Mills, and he said "yes."

If the agent had written down the whole answer of Higgins, then there would have been no ground for complaint. The defendant would then have been informed that the applicant was in doubt as to whether he had any family physician, or if he had two, which of them was the real one.

The defendant had the disclaimer of Dr. Mills, over his own signature, that he was the family physician, and an answer from the applicant himself, not directly asserting that Mills was his family physician, but making reference to him as such.

The agent says that after H. had stated that he was in doubt whether he had a family physician, and that Mills and Bryan had prescribed for him, he, the agent, asked him if he should put down his reference to Dr. Mills, and he (H.) said "yes."

If this had been the whole of the answer, the defendant should not be held estopped from alleging the falsity of the answer; but H. was acting under the advice and instructions of the defendant's agent, and when he was asked by the agent, after informing him that he was in doubt as to who was his physician, the question, put by the agent, whether he should write down a reference to Mills, was substantially a statement by the agent that, upon the facts disclosed to him, Mills was his family physician, common prudence would have dictated to the agent the propriety of referring to both Mills and Bryan, when a mistake in the reference might be fatal to the policy.

Upon the evidence, I think Higgins was misled by the agent into making an erroneous reference to Mills, when the agent should have embodied the statement of Higgins in answer to the question; and that the company should be held estopped from alleging the falsity of the answer to the twenty-sixth interrogatory.

The judgment must be affirmed.

Present — MULLIN, P. J., and TALCOTT, J. SMITH, J., not sitting.

Judgment affirmed.

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HENRY MARSHALL AND MOSES C. ROBERTS, RESPONDENTS, v. WATERTOWN STEAM ENGINE COMPANY, APPELLANT.

*Examination of witness on commission — answers to cross-interrogatories — by whom they may be read in evidence.*

Upon the trial of an action in which a witness has been examined on commission, the party at whose instance it was issued, may, after reading in evidence the direct-interrogatories and the answers thereto, read in evidence the cross-interrogatories and answers, even though the party by whom they were framed may object to his so doing.

APPEAL from a judgment in favor of the plaintiffs, entered upon the verdict of a jury, and from an order denying a motion for a new trial made on the judge's minutes.

*Lansing & Sherman*, for the appellant.

*Levi H. Brown*, for the respondents.

MULLIN, P. J. :

On the trial of this cause, the defendant read in evidence the answers of one Richardson to the direct-interrogatories put to him on behalf of the defendant, by whom the commission was issued to examine the witness who resided in Pennsylvania.

When the reading of the answers to the direct-interrogatories was finished, the plaintiff's counsel stated that he waived the reading of the cross-interrogatories and did not read them, nor the answers thereto.

Thereupon the defendant's counsel offered to read the answer to the second cross-interrogatory, and it was read.

The court then said to defendant's counsel that, the other side having waived the reading of the cross-examination, he did not think there was any rule which authorized him (the defendant's counsel) to read it.

The plaintiffs' counsel then objected to reading the second cross-interrogatory.

The court sustained the objection and defendant's counsel excepted.

The court intended by this ruling not only to hold that defendant's counsel had no right to read the answer to the cross-interrogatories, but to exclude the answer to the second cross-interrogatory that the defendant's counsel had read.

The answer thus excluded was material evidence for the defendant, and if the ruling of the court was erroneous, the defendant was prejudiced thereby.

The refusal of the court to allow the defendant's counsel to read in evidence the answer of the witness to the second cross-interrogatory was erroneous, and because of the error the judgment must be reversed and a new trial granted.

In the *Union Bank of Sandusky v. Torrey* (5 Duer, 626), the Superior Court of the city of New York held, following the decision of Justice WASHINGTON (4 Wash. C. C. R., 324), that cross-interrogatories cannot be withdrawn unless by consent of the adverse party. DUER, J., delivering the opinion of the court, says it is not difficult to imagine cases in which the rights and interests of the party might be seriously affected by the omission to put to the witness the cross-interrogatories annexed to the commission. The direct-interrogatories may not have been answered as explicitly and



fully as they might and ought to have been. The answers to the cross-interrogatories might have supplied the defect, and these interrogatories may have been withdrawn in the belief that if answered such would be the consequence.

In *Gellatly v. Lowery* (6 Bosw., 113) the same court held that if the answers, which the party taking the deposition declines to read, are relevant and competent, the other party may read them, or cause them to be read, and use them as evidence in his own favor.

The same rule must apply to the answers to cross-interrogatories, that is thus applied by the court to the answers to the direct-interrogatories.

In *Weber v. Kingsland* (8 Bosw., 415) the same court held that a deposition taken on commission issued at the instance of one party may be read in evidence by the other party at the trial, although the former refuse to read it.

The respondent's counsel endeavors to escape the effect of the erroneous ruling by saying that the answer to the second cross-interrogatory was not responsive to the question.

In this he is mistaken, the answer is as responsive as the answers of the great majority of witnesses to questions put to them. He was asked whether he remembered having an interview with Rawson, at defendant's office, on the 10th July, 1873, and instead of answering by yes or no, he said he had no interview with Rawson at the place named on the day mentioned, and he assigned as a reason why he did not, and could not have had such an interview, that he resigned his office on the eighteenth of June, and had no interview with Rawson at any time in July.

The answer was not only responsive, but was important evidence for the defendant. But the conclusive answer to the counsel's suggestion is, that the court did not put the exclusion of the evidence on the ground suggested.

A more singular ground for sustaining the ruling of the court is, that the whole deposition was taken by the jury, and they had before them the evidence excluded. I assume that the answers to the cross-interrogatories were taken by the jury. If so, then evidence excluded by the court was permitted to go to the jury, and to be considered by them, however fatal it might be to the defendant.

The defendant's counsel assented that the jury might take the

deposition, and he cannot complain of it; but he has the right to insist that he should not be held responsible for evidence that he was not permitted to discuss before the jury.

The conclusion at which we have arrived on the point under consideration renders it unnecessary to examine any of the other points discussed by the appellant's counsel.

The judgment must be reversed and a new trial ordered, costs to abide the event.

Present — MULLIN, P. J., SMITH and TALCOTT, JJ.

Judgment and order reversed and new trial granted, costs to abide event.

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NOAH D. CORNISH, RESPONDENT, v. THE FARM BUILDINGS FIRE INSURANCE COMPANY, APPELLANT.

*Policy of insurance — increase of risk — when case should be left to the jury.*

This action was brought upon a policy of insurance which provided that "any increase of hazard or material change shall avoid this policy, without consent indorsed hereon." The defense was that the premises became and were unoccupied at the time of the fire. Upon the trial, three witnesses, called by the defendant, testified that they were insurance agents, and the risk was increased by the non-occupancy of the premises. No witnesses were called by plaintiff on this point.

Defendant's counsel asked the court to direct a verdict on the ground that it was proved, without contradiction, that the risk had been increased. *Held*, that it was not error for the court to refuse so to do; that, although the evidence was competent and entitled to great weight, the jury had the right to decide the question of increase of risk upon their own views upon that question.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

The action was brought to recover the amount of a policy of insurance issued on a house of the plaintiff.

*S. Earl*, for the appellant.

*H. C. Kingsbury*, for the respondent.

MULLIN, P. J. :

The defendant insured the plaintiff's dwelling-house and barn, situate somewhere in Chautauqua county, for the term of three years from the 29th of January, 1873, in the sum of \$2,475.

The policy contained the following condition: "Any increase of hazard or material change shall avoid this policy, without consent indorsed hereon."

When the property was insured, the buildings were occupied by a tenant of the plaintiff, and they continued to be so occupied until the forepart of May, before the fire, which occurred on the 4th of July, 1874, when the tenant left, and the premises were not again occupied by any person, and were not occupied at the time of the fire.

The defendant, on the trial, called three witnesses, who testified that they were, and had been for several years, insurance agents, and accustomed to examine risks and adjust losses, and that the risk of the insurance was increased by reason of the premises insured being unoccupied; and the reasons for so testifying were, that the buildings were more liable to be occupied by tramps and children.

The plaintiff gave no evidence on the question whether the risk was increased because the premises were unoccupied.

At the close of the evidence, the defendant's counsel asked the court to order a verdict for the defendant, on the ground that, by the evidence, the risk had been proved to have been increased, and there was no conflicting evidence on that point.

The court refused to order a verdict as requested, and defendant's counsel excepted.

The counsel asked the court to charge the jury that the policy became void by reason of the premises being unoccupied. The court refused so to charge, and defendant's counsel excepted.

The jury found a verdict for the plaintiff, on which judgment was entered, and from it the defendant appeals.

When the evidence in a cause is conflicting, and when different constructions may be put upon the same writing or statement, or different inferences may be drawn from the same state of facts, the questions of fact must be submitted to the jury, and the court has no authority to take it from them.

In the case before us the question was not one of skill or science

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FOURTH DEPARTMENT, APRIL TERM, 1877.

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merely ; it was one that the jury could have decided if the evidence of the experts had not been given. Their evidence was competent, and entitled to great consideration in deciding the question of fact, but it was not controlling. The jury had the right to decide the question of increase of risk, upon their own views upon that question. (*Grant v. Howard Ins. Co.*, 5 Hill, 10, and cases cited.)

The judgment must be affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed.

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THE NATIONAL BANK OF AUBURN, RESPONDENT, v.  
EDWIN LEWIS, IMPLEADED, ETC., APPELLANT.

*Usury — how pleaded.*

A plea of usury must set forth the usurious agreement, the names of the parties between whom it was made, the amount loaned, the amount of usury agreed to be paid, the length of time for which the loan was agreed to be made, and that the agreement was corrupt.

An answer which fails to allege any agreement between the parties, but merely alleges that the plaintiff took and reserved more than seven per cent, without, so far as appears, the consent of the borrower, is fatally defective.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

The action is on a note made by Beach Brothers & Co., for \$1,680, bearing date the 31st of August, 1874, payable three months after date to the order of William Baker at the National Bank of Auburn.

The answer contains six defenses :

The first is a denial of the delivery to the plaintiff of said note, or that he is indebted thereon.

Second. That he was an indorser on said note for accommodation of the makers, and without any consideration therefor ; that it was made and indorsed for the sole purpose of being discounted by the plaintiff for the sole benefit of the makers, which facts were known

to the plaintiff at the time of the discount, and that at the time of the discount the plaintiff knowingly, corruptly and usuriously deducted therefrom, and took and received or charged by way of discount, and knowingly and corruptly took, received and reserved for the loan or forbearance of the sum mentioned in the note for the time it had to run a sum larger than at the rate of seven per cent per annum to wit, the sum of \$160, or thereabouts, whereby said note and indorsement became void by the laws of this State.

Third. The third defense sets up the same matters, and alleges that the taking of the illegal interest was contrary to the act of congress, entitled an act to provide a national currency, approved February 25, 1863, and said note became void.

Fourth. The fourth defense is a denial of the corporate existence of the plaintiff.

Fifth. The fifth defense is the same as the second, except that it claims that taking illegal interest should be held to be a forfeiture of the entire interest which said note carries with it.

Sixth. The sixth defense is that said note was the last renewal of a long series of renewals, on each of which plaintiff received and took usurious interest, and that the aggregate of said sums of usurious interest should be deducted from the amount due on said note.

On the trial the defendant admitted the corporate existence of the plaintiff.

The note was then read in evidence. The defendant admitted protest and notice, and the amount of interest due on said note, and the plaintiff rested.

The plaintiff conceded that defendant was an accommodation indorser without consideration.

The defendant called the plaintiff's teller, and was proceeding to examine him when plaintiff's counsel objected to any evidence being given in support of the allegations or defenses in the answer, on the ground that they set up no defense to the action.

The objection was sustained by the court and defendant's counsel excepted.

The defendant's counsel thereupon offered to prove the matters set up in his several defenses, except the fourth, to which the plaintiff's counsel objected. The court sustained the objection and defendant's counsel excepted.

The court ordered judgment in favor of the plaintiff for the amount of the note and interest thereon from its maturity, and from that judgment the defendant appeals.

*Rollin Tracy*, for the appellant.

*E. H. Avery*, for the respondent.

MULLIN, P. J. :

All the defenses, except the fourth, are based upon usury, and if that defense is not available, it will not be necessary to consider any of the allegations connected with it.

The plea of usury at the common law, and the answer setting up the same defense under the Code, must set forth the usurious agreement, the names of the parties between whom it was made, the amount loaned, the amount of usury agreed to be paid, the length of time for which the loan was agreed to be made, and that the agreement was corrupt. (*Manning v. Tyler*, 21 N. Y., 567; *Fay v. Grimstead*, 10 Barb., 321; *Gould v. Horner*, 12 id., 601; *Banks v. Van Antwerp*, 5 Abb. Pr., 411; *Smalley v. Dougherty*, 6 Bosw., 66; *Nat. Bk. of Metropolis v. Orcutt*, 48 Barb., 256.)

The averments of usury in the several defenses are substantially in the same language, and are in the following words: "Plaintiff discounted said note for the sole benefit of said makers thereof, and then and there, at the time of the said discount thereof, knowingly, corruptly and usuriously deducted therefrom, and took and received, reserved or charged by way of discount, and then and there, knowingly, corruptly and usuriously, took, received, reserved, or charged for the loan or forbearance of the sum of money secured thereby, for the time the same then had to run, to wit, for the time of three months, and three days, including the days of grace allowed by law upon commercial paper, payable on time, a sum of money much larger than at and after the rate of seven per cent per annum, to wit, the sum of \$160 or thereabouts."

It will be seen that the answers do not even allege an agreement between the parties. On the contrary, the averment is, that the plaintiff took and reserved more than seven per cent without, so far as the answer alleges, the consent of the borrower.

Such an answer is fatally defective, and no attempt was made to amend it.

The defenses were properly rejected because of the defects in the answer.

The judgment must be affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed.

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EPHRAIM V. HORN AND OTHERS, APPELLANTS, v. LOREN R. PULLMAN AND OTHERS, RESPONDENTS.

*Probate of will — admissions of devisees — when admissible — Improper rejection of evidence by surrogate — when his judgment reversed because of.*

The appellants contested before the surrogate the probate of the will of one Horn, on the ground of incapacity and of fraud and undue influence. The testator devised the property to a granddaughter and her husband, jointly. Upon the hearing, the counsel for contestant proposed to prove statements of the granddaughter, made at or about the time of making the will, that the testator ought to leave all his property to herself and husband; that she had consulted a physician as to his mental capacity; that he would do whatever she asked him; that they meant to have the property; which evidence was, upon the objection of the counsel for the proponents, rejected. *Held*, that this was error.

Where competent evidence has been rejected by the surrogate, his judgment or decree will not be reversed, unless, if such evidence had been received and a finding had been made in conformity thereupon, the court would have affirmed the decree.

APPEAL from a decree of the surrogate of Herkimer county, admitting to probate the will of Cornelius Horn, deceased.

Probate of the will was contested on the ground of the mental incapacity of the testator, and of fraud and undue influence practiced upon him by the beneficiaries under the will.

*H. J. Cookingham*, for the appellants.

*S. S. Morgan*, for the respondents.

MULLIN, P. J.:

The contestants utterly failed to make a case before the surrogate, establishing either a defective execution of the will, insanity of the testator, or that it was the result of undue influence on the part of devisees or other persons over the testator.

The most that can be said to be proved by the contestants is, that the testator was an old man laboring under some of the infirmities incident to old age, but his mind was sound and his capacity to make a will as good as that of the majority of persons of the same age.

He was suffering from a disease the effect of which was to weaken and ultimately to destroy his mind, but at and near the time when the will was executed he was able to transact ordinary business, and to understand the claims of the members of his family on his bounty.

By wills, prior in date to the one offered for probate, he had made a very different disposition of his property from that made by the one under consideration. This fact is entitled to considerable weight in determining the questions of capacity and undue influence, but if it is true that his children declined to take him to their houses and take care of him, and the devisees took upon themselves the burthen of caring for him, diseased and disabled as he was, it was natural that he should give them his property rather than to his children.

On the hearing, the contestants called as a witness Samuel W. Butterfield, who testified that he saw Mrs. Cornelius Pullman, one of the devisees named in the will, at his house in September, 1875, and had a conversation with her about the testator and his will.

The counsel for the contestant then asked the witness, "what was that conversation." The question was objected to by the counsel for the proponents as incompetent and immaterial and the objection was sustained.

The contestants' counsel then offered to prove by the witness that she had said they had got the property. They had got it so fixed that if the children of Horn contested the will, they would have to pay their own costs. He also offered to prove that she had stated that they had consulted a physician beforehand, to see if he was competent to make a will, and that her grandfather was a nice old man, and he would do any thing she asked him to; these offers were severally objected to, and the objections sustained.



The contestants' counsel then offered to prove that Mrs. Pullman said to Jane Horn, that she (Mrs. P.) thought that what property her grandfather (the testator) has got, when he is done with it, he ought to will to Mrs. P. and her husband, as they were the ones that had worked for him, and done for him and waited on him; they were the ones that ought to have it, and they are going to have it, too. The evidence offered was objected to, and rejected.

The ruling of the surrogate upon these offers of evidence presents two questions, and these are :

First. Were the declarations of Mrs. Pullman admissible in evidence against herself and husband or against her alone? and,

Second. If competent, was the evidence offered and rejected so material as that, if received, the surrogate might, upon it, in connection with the other evidence in the case, have refused to admit the will to probate?

By the will, the farm and property were devised to Pullman and wife, jointly.

It is said, in 1 Greenleaf on Evidence, section 174, that in the absence of fraud, if the parties (plaintiff and defendant) have a joint interest in the matter in suit, an admission made by one is, in general, evidence against all, \* \* \* and when several were both legatees and executors in a will, and also appellees in a question upon the probate of a will, the admission of one of them, as to facts which took place at the time of making the will, showing that the testatrix was imposed upon, was held receivable in evidence against the validity of the will. (*Jackson v. Vail*, 7 Wend., 125; *Osgood v. The Manhattan Co.*, 3 Cow., 612; *Atkins v. Sanger*, 1 Pick., 192; *Smith v. Sergeant*, 2 Hun, 107.)

The evidence offered was improperly excluded.

We now come to the question, whether the decree of the surrogate should be reversed, because of the improper rejection of the evidence offered.

In *Clapp v. Fullerton* (34 N. Y., 190) the Court of Appeals held that, if in reviewing the proceedings before a surrogate, it is made apparent upon the whole case, irrespective of evidence improperly admitted, that the testator was clearly competent and that the will was properly admitted to probate, the court below was right in holding that the error was not fatal.

In thus deciding, the court must have assumed that the illegal evidence did not and could not impair the force of the competent evidence so as to justify the inference, that it operated prejudicially on the mind of the surrogate.

It seems to me, the same principle should be applied when competent evidence is rejected. The court sitting in review of the action of the surrogate should inquire whether, if the evidence rejected had been received and a finding in conformity therewith had been had, the court would affirm the decree. If it would, then the decree should be reversed by reason of the rejection of the evidence offered, otherwise the error should be disregarded.

In this case, neither insanity nor undue influence was established by the contestants. The proof offered and rejected, although competent upon one or both of these questions, fell far short of establishing either, nor would it establish either when added to the other evidence in the case upon those issues.

The decree of the surrogate should be affirmed, with costs.

Present—MULLIN, P. J., TALCOTT and SMITH, JJ.

Decree of surrogate affirmed, with costs.

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CHARLES BUCHANAN, APPELLANT, v. JOHN W. SMITH,  
RESPONDENT.

*Loan of articles for a specific purpose — liability of borrower, if they are used for other purposes — burden of proof, as to cause of injuries.*

Plaintiff loaned a yoke of oxen to defendant to plow up a hedge. Defendant used them not only for this purpose, but also to draw stone and to load large stone upon a stone-boat. *Held*, that drawing stone and rolling them on a boat were not the uses for which the oxen were loaned, and that defendant was liable for any injuries to the cattle occasioned thereby.

Upon the trial of an action to recover for injuries sustained by one of the oxen, it appeared that the oxen were sound when taken by defendant; while in his control they were put to unauthorized uses; that when returned one of them was lame. Defendant gave no evidence as to how the injury was occasioned. *Held*, that it was a reasonable inference that the injury occurred while they were improperly used.

APPEAL from an order of the County Court of Wayne county, denying a motion by plaintiff for a new trial, made on a case and exceptions after a nonsuit had been directed by the court.

*E. M. Walker*, for the appellant.

*J. W. Hoag*, for the respondent.

MULLIN, P. J. :

In April, 1875, the defendant's wife applied to the plaintiff, in behalf of defendant, for the use of a yoke of oxen, of which he was the owner, to plow up a hedge. Defendant consented, and the next day defendant's son went to plaintiff's house and got the cattle. They were then sound and in good order. They were returned in the afternoon of the same day, about three o'clock; one of them was then lame in the shoulder, and the leg was covered with mud. The lameness continued some three months, and plaintiff paid out three dollars for medicine for it.

About nine A. M., of the day on which the oxen were taken by defendant, it began to storm, and it rained and snowed for about two hours. The cattle were used during the storm, not only in plowing the hedge, but in drawing stone and in loading a large stone on a stone-boat.

The defendant had pulled up alder bushes in the vicinity of the hedge, leaving holes in the ground where the alders had grown.

Defendant told plaintiff that the ox had stepped on a rolling stone and had thus caused its lameness.

Several witnesses were permitted to testify, notwithstanding the defendant's objection, that it was not proper to use the oxen in the storm, although it came on while the cattle were used by defendant.

No evidence was given on the part of the defendant. The action was commenced in a Justice's Court of the county of Wayne to recover damages for the injury to the ox, and for loss of its service. The plaintiff had judgment.

The defendant appealed to the County Court of the county of Wayne, and, on the trial, the facts hereinbefore set forth were proved on the part of the plaintiff.

The court, on motion of the defendant, nonsuited the plaintiff. To which ruling and decision the plaintiff's counsel excepted.

The plaintiff's counsel moved for a new trial in said court, and the motion was denied, with costs, and from that order the plaintiff appeals to this court.

The general rule is, that to entitle a plaintiff to recover for injury to property hired by him to another for a compensation to be paid by the latter, he must prove that the injury was caused by reason of the negligence of the hirer. (Story on Bailments, §§ 397, 399, 413; *Harrington v. Snyder*, 3 Barb., 380.)

The hirer is bound to exercise ordinary care in the use of the property, and if he fails to use that measure of care, he is responsible to the owner for the damages resulting from his neglect. (Story on Bailments, sections above cited.)

The hirer cannot use the property hired for any purpose other than that for which he disclosed to the owner he intended to use it; and if he appropriates it to another use, and it is injured while so used, the hirer is liable for whatever damages are sustained by it, but he may be liable also as for a conversion of it. (Story on Bailments, § 413; *Collins v. Bennett*, 46 N. Y., 490.)

Drawing stone and rolling them on to a stone-boat were not the uses to which plaintiff was informed the oxen were to be applied; and the defendant was therefore liable for the damages sustained by them. The defendant's counsel insists that before the defendant can be held liable for the wrongful use of the oxen, it was incumbent on the plaintiff to prove that they were injured while so improperly used.

They were shown to be sound when taken by defendant; that they were used for purposes not disclosed to the plaintiff, and one of them was lamed while in defendant's custody; he could have proved precisely how the injury occurred, but did not, and the inference was a reasonable one that the injury occurred while they were improperly used. (*Collins v. Bennett*, *supra*.)

It is said that the plaintiff proved by the admission of the defendant how the injury was done to the ox, and that was by stepping on a rolling stone. But the mud on the leg, and the lameness of the shoulder would indicate that it had stepped into a hole and had thus sprained the limb.

FOURTH DEPARTMENT, APRIL TERM, 1877.

The mud on the leg is accounted for by the defendant's counsel as caused by the ox stepping in the furrow, and cites us to the testimony of the witness Taintor. Taintor does not testify to any such thing. He says the lame ox was the one that would go in the furrow. But it is not proved that he went in the furrow, or that any furrow was made.

No connection is proved between the storm and the injury, and we cannot assume that the use of the cattle during the storm contributed in any degree to the injury.

The plaintiff was improperly nonsuited. The order refusing a new trial must be reversed and a new trial granted, costs to abide event.

Present—MULLIN, P. J., TALCOTT and SMITH, JJ.

Order of County Court reversed and a new trial granted, costs to abide event.

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CAROLINE PEACH, RESPONDENT, v. THE CITY OF UTICA,  
APPELLANT.

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*City of Utica—liability of, for defects in highway—funds in treasury to make repairs, not essential to—Right of persons with defective sight to travel in streets—Notice to city—how proved.*

In an action against the city of Utica to recover for injuries sustained in consequence of a defect in a street therein, *held*, that as the common council was declared by the charter to be commissioners of highways, the city was bound to keep the streets and walks in repair, and in case it failed so to do, and injury resulted therefrom, it was liable to the person injured for such damages as he might sustain thereby.

Such liability does not depend upon whether or not the city has funds in its treasury to pay for making or repairing streets, but upon the question whether or not it has the power to raise funds to defray such expenses.

The fact that a person is old, and that his sight is defective, does not deprive him of the right to travel in the streets and upon the walks, provided he uses such reasonable care and caution as a person laboring under those infirmities would ordinarily exercise.

Although notice to one of the aldermen of a defect in the highway is not enough to charge the city, with notice, yet *quære*, whether notice to a considerable number of the aldermen would not be sufficient.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

*John D. Kernan*, for the appellant.

*S. J. Barrows*, for the respondent.

MULLIN, P. J. :

Appeal from a judgment in favor of the plaintiff, rendered at the Oneida Circuit in January, 1876.

The plaintiff, in the evening of the 8th of May, 1875, while passing from a store in the city of Utica, where she had gone to make purchases, stepped, as she claims, into a hole in the sidewalk on the westerly side of Steuben street, in said city, at the crossing of Hobart street, broke the tendon at or near the heel of one of her feet, was made lame, suffered a good deal of pain and was unable, for a considerable time, to leave her house, and at the time of the trial she was still suffering from the injury.

It was proved that she was seventy-four years of age ; her sight was defective ; she used spectacles when she was following her business, which was that of sewing, but did not have them on while she was on her way to and from the store. She was not accustomed to travel in the night. There were three young ladies in company with her at the time of the injury, two of them walked some feet ahead of her, the other only about a foot from her, they passed the hole in safety. The accident occurred about nine o'clock in the evening, and it was then quite dark. She exercised no particular care in traveling along the walk.

One of the aldermen of the city was called as a witness by the plaintiff, and was asked by the plaintiff's counsel whether, prior to the day of the injury, he had crossed Hobart street on the westerly side of Steuben. The question was objected to by the defendant's counsel. The plaintiff's counsel stated the object of the question was to show he knew the walk was out of repair. The objection was overruled, and defendant's counsel excepted.

The defendant's counsel moved for a nonsuit on the grounds :

First. That defendant is not liable in actions of this nature, as it acts judicially under its charter, and it has no funds under its control

for the purpose of repairing or relaying side or crosswalks. It has no power to use any portion of the general city funds for such a purpose.

Second. The plaintiff was chargeable with negligence contributing to the injury.

It was proved that the plaintiff, after the injury, without the approval of her physician, had applied poultices to the injured parts for a period of some two weeks, and the defendant's offered to show that in other cases the injury had been aggravated by such treatment. The evidence was objected to, and rejected.

The defendant's counsel requested the court to charge the jury, that ordinary care and prudence on a dark night requires the vigilant uses of her senses of sight and feeling in a person of the plaintiff's age, with her faculties.

The court said in reply: "I would not put it in that shape, perhaps, but substantially that. I would say it requires such care as a reasonable person under such circumstances ought to exercise."

The defendant's counsel excepted to the modification of the offer made by the court and insisted that the charge should be in the language of the request.

The plaintiff had a verdict for \$500, upon which judgment was entered, and from it the defendant appeals.

The appellant having appealed from the judgment only, we can review only questions of law. To enable us to review the facts, there should have been a motion for a new trial and an appeal from the order refusing it. (*Thurber v. Harlem Bridge, etc., R. R. Co.*, 60 N. Y., 326.)

A nonsuit was properly refused on the first ground stated by the counsel.

The common council are declared by the charter to be commissioners of highways within the limits of the city, and being such, the city is bound to keep the streets and walks in repair, and if not done and injury results from the omission, it is liable to the person injured for such damages as he may thereby sustain. (*Conrad v. The Trustees of Ithaca*, 16 N. Y., 158; *West v. The Village of Brockport*, id., 161; *Hines v. City of Lockport*, 41 How. Pr. R., 435.)

The liability does not depend upon whether the city has funds in its treasury to pay for making or repairing streets and walks, but

whether it has the power to raise funds to defray such expenses. (*Hines v. City of Lockport, supra.*)

The city of Utica has ample power to raise money for such purposes. (Chap. 18, Laws of 1862, § 108.)

If the defendant's counsel is right in his proposition that the defendant is not liable for the injury in this case, because it is clothed with judicial power to determine when the streets or walks are out of repair, or because it has not ample power to raise funds to pay for repairs of streets and walks, the Court of Appeals and the Supreme Court have erroneously decided a large number of cases within the last thirty years.

The second ground on which a nonsuit was asked for was equally untenable with the former one.

There was no proof of contributory negligence on the part of the plaintiff. Because she was old and her sight imperfect, she was not deprived of the right to travel in the streets and upon the walks, using such reasonable care and caution as a person laboring under these infirmities would ordinarily exercise. In the language of HUNT, Ch. J., in *Davenport v. Ruckman* (37 N. Y., 568, 573): "The streets and sidewalks are for the benefit of all conditions of people, and all have the right in using them to assume that they are in good condition, and to regulate their conduct upon that assumption. A person may walk or drive in the darkness of the night, relying on the belief that the corporation has performed its duty, and that the street or the walk is in a safe condition. \* \* \* So one whose sight is dimmed by age, or a near-sighted person, whose range of vision was always imperfect, or one whose sight has been injured by disease, are each entitled to the same rights and may act upon the same assumption."

The court very properly rejected evidence of the effect of poultices in cases other than the one on trial.

It was for physicians to say whether poultices were properly applied by the plaintiff, having regard to the kind as well as to the length of time they were so applied. The effect of them in particular cases was not a proper subject of inquiry.

In order to charge the city with negligence in not repairing the walk at the place where the injury occurred, it was incumbent on the plaintiff to prove that the common council knew of the defect



a sufficient length of time before the accident to have enabled it to repair it.

Notice to one of the aldermen was not enough, but the evidence of notice to one of them was so immaterial that it could not injure the defendant. Several witnesses swore to the existence of the defect in the walk weeks before the accident, long enough to authorize the inference that it was known to the common council for a sufficient length of time to enable them to repair it.

I am not prepared to say that notice to the common council of a defect in a street or walk may not be proved, by showing that it was known to a considerable number of the aldermen. If it may be, then proof of notice to one, although not enough perhaps to charge the common council with notice, yet it is admissible as a link in the chain of proof and cannot be rejected as wholly incompetent, but if sufficient evidence is not given to establish notice, the party complaining of the evidence should move to strike it out.

The court charged the jury substantially as requested by the defendant's counsel, and was not obliged to charge in the precise language of the request. The judgment must be affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed.

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JOHN B. BURNET AND JOHN W. BARKER, COMMITTEE,  
ETC., OF MOSES D. BURNET, A LUNATIC, APPELLANTS, v.  
JEAN E. BOOKSTAVÉR AND DANIEL BOOKSTAVÉR,  
RESPONDENTS.

*Committee of estate and person of lunatic — cannot bring action of ejectment.*

The committee of the estate and person of a lunatic cannot bring, in his own name, an action to recover the possession of real property alleged to have belonged to the lunatic prior to his appointment.

Such action must be brought in the name of the lunatic.

Such a committee is not the trustee of an express trust, within the meaning of section 118 of the Code of Procedure.

APPEAL from an order of the Special Term nonsuiting the plaintiff herein, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

*Hiscock, Gifford & Doheny*, for the appellants. The committee in whose names, as plaintiffs, this action was brought are "trustees of an express trust," and as such entitled to maintain it as brought by them. (Code of Procedure, § 113; Wait's Practice, vol. 1, p. 105; *Persons v. Warren*, 14 Barb., 488, 491, 496; *Davis v. Carpenter*, 12 How., 287; *Thomas v. Bennett*, 56 Barb., 197.) The objection should have been taken by demurrer under section 148 of the Code, and not having been so taken, the same was waived. (*Robbins v. Wells*, 26 How., 15; *Palmer v. Davis*, 28 N. Y., 242; *Fulton Fire Ins. Co. v. Baldwin*, 37 id., 648; *Van Amringe v. Barrett*, 8 Bosw., 357.)

*Ruger & Jenney*, for the respondents. An action at law to recover the possession of real property belonging to a lunatic must be brought in the name of the lunatic. (*Petrie v. Shoemaker*, 24 Wend., 85; 1 Hill, 97; 8 Barb., 552; *Fields v. Parsons*, 9 N. Y. S. C. [1 Hun], 400.)

MULLIN, P. J.:

The plaintiffs, as the committee of the person and estate of Moses D. Burnet, bring this action to recover the possession of certain real estate in the city of Syracuse which belonged to the lunatic before the appointment of the plaintiffs as his committee, alleged to have been illegally entered upon, and to be illegally withheld by the defendants.

The defendant Jean in her answer denies the complaint, and as a further defense alleged that in consideration that she would remove from her residence at Dunkirk and occupy the premises in question in the suit, and take care of said Burnet and wife (they furnishing their own support) during their lives and the life of each of them, he, said Burnet, would, by will, devise said property to said Jean in fee, or convey the same to her by deed. She avers that, in pursuance of the said agreement, she removed to Syracuse

and went into possession of said premises and took care of said Burnet and wife, and is therefore entitled to a conveyance of said premises.

On the trial at the Onondaga Circuit in May, 1876, the plaintiffs proved their appointment as committee of the person and estate of said Burnet, and the possession of defendants, and rested.

The defendants then moved that plaintiffs be nonsuited, because the action should have been brought in the name of the lunatic and not in the names of the committee.

The motion was granted and the plaintiffs nonsuited.

The plaintiffs' counsel asked leave to amend by altering the title of the action, so that it should be brought by the lunatic by his committee, but the court refused to allow the amendment.

The plaintiffs' counsel moved for a new trial on the judge's minutes, which was refused.

The plaintiffs appeal from the order directing the nonsuit, and from the order refusing a new trial.

Before the enactment of the Code of Procedure both legal and equitable actions on behalf of lunatics were required to be brought in their names by the committee of their persons and estates, except in equity, when the action was to set aside a deed or the act of the lunatic on grounds of insanity, the action might be brought in the name of the committee. (*Petrie v. Shoemaker*, 24 Wend., 85; *Lane v. Schermerhorn*, 1 Hill, 97; 2 Barb. Ch. Pr., 223.)

In 1845, the legislature passed an act entitled "An act in relation to the powers of receivers and committees of lunatics and habitual drunkards." (Chapter 112 of the Laws of that year.)

By the second section of that act committees of lunatics, etc., appointed by order of the Court of Chancery, were authorized to sue in their own names for any debt, claim or demand, transferred to them or to the possession and control of which they are entitled.

As to all other causes of action the lunatic was still a necessary party.

The reason why the action was required to be brought in the name of the lunatic was, that the legal interest in the subject of the action was in him and not in his committee.

Section 111 of the Code requires the action to be prosecuted in the name of the real party in interest, except as otherwise provided

in section 113. Section 113 provides, that an executor or administrator, a trustee of an express trust, or person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted.

The appellants' counsel insists that the plaintiffs, as the committee of the person and estate of the lunatic, are the trustees of an express trust within the meaning and intent of this action, and as such can maintain the action in their own names.

Story, in his Commentaries on Equity (second volume, section 964), defines a trust as follows: "A trust in the most enlarged sense in which that term is used in English jurisprudence, may be defined to be an equitable right, title or interest in property, real or personal, distinct from the legal ownership thereof."

In the introduction to Hill on Trustees, a trustee is defined to be "a person in whom some estate, interest or power in or affecting property of any description is vested for the benefit of another." The author then proceeds as follows: "This definition would include executors and administrators, guardians of infants and committees of lunatics, as thus filling a fiduciary situation. It would also extend to bailees, factors and agents, whose duties in their fiduciary characters are recognized and enforced at common law."

The trustee treated of in his work is not embraced in either of the classes last named, but is the person recognized as such by and is amenable only to courts of equity.

It is one of the essential elements of a trust, that the title to, or some interest in, property should vest in the trustee to be held for the benefit of another.

Before the Code it was held, as already stated, that the committee of a lunatic could not maintain an action of ejectment in his own name for lands of the lunatic, because the committee has no estate in the lands. (*Petrie v. Shoemaker*, 24 Wend., 85.)

In *Lane v. Schermerhorn* (1 Hill, 97), BRONSON, J., after referring to the decision last cited, and reaffirming the principle laid down in it, adds: "The committee is a mere bailiff or servant, and the interest and right of action remain in the lunatic."

The act of 1845 above cited gives to the committee a power to sue for claims due to the lunatic, and, as a conveyance, gives to him an interest in the claim sufficient to maintain the action, but no

legal interest is given to the committee in any other property of the lunatic.

The law, as it existed when the cases in 24 Wendell and 1 Hill were decided, has never been changed, and the committee of a lunatic has no greater estate or interest in the real estate of the lunatic now than he had then.

Is the committee of a lunatic the trustee of an express trust? The term "express trust" is not to be limited to express trusts defined in the Revised Statutes, but embraces all valid trusts, the duties and purposes of which are expressly defined as distinguished from implied or constructive trusts.

By section 1, title 2, chapter 5, part 2 of the Revised Statutes (vol. 3, p. 134, § 1 [5th ed.]), it is provided that the Supreme Court shall have the care and custody of all idiots, lunatics and persons of unsound mind, and of their real and personal estates, so that the same shall not be wasted or destroyed, and shall provide for their safe keeping and maintenance, and for the maintenance of their families, etc.

The court, and not the committee, is the trustee of the property of the lunatic, and the committee is the mere servant or bailiff of the court to carry into effect its directions, concerning the management and disposition of the estate.

In equity, the committee of a lunatic has been permitted to maintain an action to set aside a deed or other instrument executed by the lunatic when insane. (*Person v. Warren*, 14 Barb., 488; *Fields v. Fowler*, 2 Hun, 400.) But I do not find that the committee has ever been permitted to maintain a purely legal action in his own name.

I am therefore of the opinion that the learned judge was right in nonsuiting the plaintiff.

Why he refused leave to plaintiff to amend by making the lunatic the plaintiff is not disclosed, but we are bound to presume that it was properly refused. Had it been granted, it must have been upon terms of paying the whole costs up to and including the trial. After the nonsuit he would have been permitted to amend upon the same terms.

The order denying the motion for a nonsuit is affirmed.

Present—MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment and order affirmed.

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88 Ms<sup>1</sup> 87

ROBERT ELLIOTT, APPELLANT, v. BENJAMIN G. LEWIS,  
RESPONDENT.

*Deed — description in — survey must commence at place of beginning.*

In determining what premises are conveyed by a deed, the survey must be commenced at the place of beginning designated in the deed, unless it clearly appears that to do so would destroy the grant.

The fact that to commence at said point would give to the grantee more or less land than the deed calls for, does not authorize a departure from the general rule.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee. The action was in ejectment, and the accompanying diagram, offered in evidence on the trial, shows the location of the premises in dispute.

*Randall & Randall*, for the appellant.

*B. G. Lewis*, respondent, in person.

MULLIN, P. J. :

This action is brought to recover a strip of land, of which plaintiff claims to be owner, in Central Square, in the county of Oswego, and is parcel of a larger tract which he alleges he owns, and of which parcel defendant is unlawfully in possession.

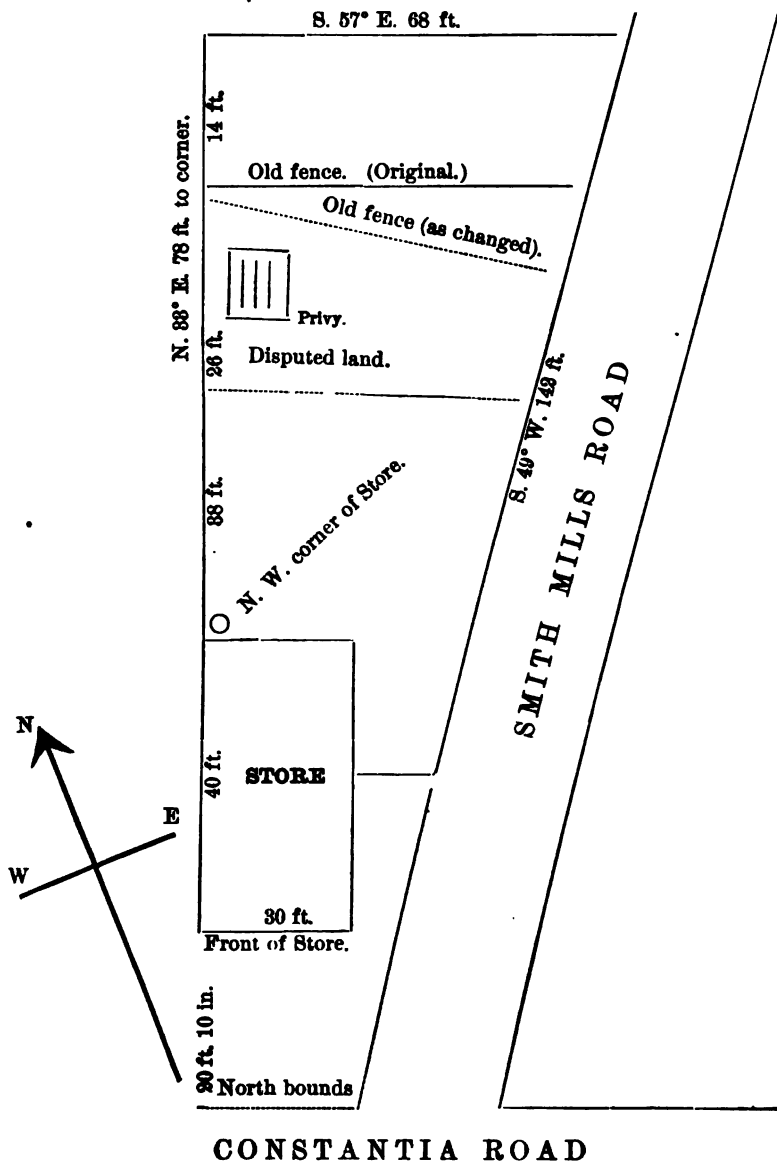
The deed describes the whole lot conveyed to plaintiff, as follows : Beginning at the north-west corner of the store on the lot, thence north thirty-three degrees east seventy-eight feet ; thence south fifty-seven degrees east, to the road running to Smith and Brewster's mills ; thence along said road south forty-nine degrees west, to the road leading to Constantia ; thence north fifty-seven degrees west, to the place of beginning.

The north-west corner of the store is a well known monument, and commencing at that point and running the lines according to the calls in the deed, the piece of land in dispute belongs to the plaintiff.

The referee in his findings disregards the place of beginning

FOURTH DEPARTMENT, APRIL TERM, 1877.

Map of Robert Elliott's Store Lot at Central Square, N. Y.



mentioned in the deed, and holds the place of beginning to be the south-west corner of the store. Beginning at the south-west corner and following the courses in the deed, the land in dispute belongs to the defendant and not to the plaintiff.

The referee declines to begin at the north-west corner of the store, for two reasons :

First. Because it would give to plaintiff considerably more land than he is entitled to under his deed ; and,

Second. Because the last course in the deed would carry the line diagonally through the store, thus excluding from the conveyance a considerable part of the land.

A grantee is entitled as against his grantor and all those claiming under him by grant, subsequent to the conveyance to such grantee, to all the land embraced in his deed, and whether the quantity is more or less than was intended to be conveyed, the title passes and the grantee is owner so long as the deed remains unreformed.

If other persons have acquired a better title to part of the land covered by the deed, the grant will be restricted accordingly.

If the deed to plaintiff conveys to him the strip of land in dispute, it does not help the defendant that there is a mistake in a course in the deed that does not touch the land in controversy.

The referee could not disregard the place of beginning mentioned in plaintiff's deed and adopt another, because it might in his own opinion more correctly give effect to the intention of the parties. The survey must commence at the place designated for its commencement in the deed, unless, perhaps, it clearly appears that to adopt it would destroy the grant.

It was held, in *Wendell v. Jackson* (8 Wend., 183), that when a tract of land in a patent is described as beginning at a corner of another tract, and the termination of the third course given in the grant is described in another patent subsequently issued as a clump of rocks on the shore of a lake, if the corner mentioned as the place of beginning is sufficiently ascertained by proof, the location of the premises granted must be made by commencing at such corner, although in doing so, by pursuing the courses and distances, the clump of rocks will not be reached, the third course will be shortened one-half, one whole course will be lost, one end of the tract thrown into the form of an acute angle, instead of having a base of fifty



chains, and the quantity of land be reduced nearly one-half. (*Jackson v. Wendell*, 5 Wend., 142; *Jackson v. Wilkinson*, 17 Johns., 146; *Smith v. McAllister*, 14 Barb., 434; *Van Wyck v. Wright*, 18 Wend., 157.)

The error as to the place of commencing the survey is fatal to the judgment.

It is possible that the defendant may claim to the fence, as located by Purden, on the northerly line of the store lot, and that although plaintiff's deed extended beyond that fence, yet he did not occupy all to which his deed entitled him, but whether this is so or not plaintiff does not claim any land beyond seventy-four feet from the north-west corner of the store, so that the inquiry as to whether the remaining fourteen feet is covered by the deed, ceases to be material.

I have not examined the other exceptions discussed by the appellant's counsel in the brief; as the evidence and rulings on another trial may be essentially different, it will be time enough to consider them should they be again presented.

The judgment is reversed and a new trial granted before another referee, costs to abide event.

Present—MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment reversed and new trial granted before another referee, costs to abide event.

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MARIETTA A. GATES, RESPONDENT, v. THE PENN FIRE  
INSURANCE COMPANY, APPELLANT.

*Policy of insurance — when company estopped by acts of agent.*

An agent of defendant having been informed that plaintiff wished to procure a policy of insurance upon a stable owned by him, had a conversation with him, in which plaintiff stated that he held the place under a contract, and that the vendor owed him enough to pay all that was due upon it. Subsequently the agent sent plaintiff a policy in which it was stated that the plaintiff was the owner. No written application was made or signed by plaintiff. The policy provides that the person procuring the insurance, other than the assured himself, should be deemed the agent of the assured. Plaintiff, at the time of the conversation, had no knowledge of the conditions or provisions of the policy.

In an action upon the policy the defense was a violation of a condition providing that if "the interest of the assured were any other than the entire, unconditional and sole ownership, it must be represented to the company and so expressed in the written part of this policy, otherwise the policy shall be void."

*Held,*

- (1) That as plaintiff was ignorant of the provision contained in the policy making the agent of the company his agent, he was entitled to treat him as the agent of the company.
- (2) That as it was the duty of the agent to insert in the policy plaintiff's interest in the premises as it had been disclosed to him, the company was estopped from setting up his failure so to do as a defense to the action.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

The action was brought upon a policy of insurance issued to one Volney J. Warren, and by him assigned to the plaintiff.

The policy insured Warren "on his farm building occupied by him as a livery, barn," etc. It also contained the following provisions :

"References being also had to the application of the assured, which forms part of this policy, and is a warranty on the part of the assured.

"If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, or if the building insured stands on leased ground, it must be represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void.

"It is expressly understood and agreed that the person or persons, if any other than the assured, who have procured this insurance to be taken by this company, shall be deemed the agent or agents of the assured, and not of this company, in any transactions relating to this insurance."

*F. W. Hubbard*, for the appellant.

*N. Whiting*, for the respondent.

MULLIN, P. J. :

By the evidence in this case it appears that a short time prior to the 16th June, 1874, Volney Warren applied to R. R. Browne, an insurance agent residing and doing business at Carthage, in Jeffer-

son county, to insure his livery stable, barn and dwelling-house, situate in the village of Carthage aforesaid.

Browne could not take the risk, and wrote E. J. Clark, defendant's agent, at Watertown, in said county, requesting him to take it. Clark went to Carthage, and on the morning of the 16th June met said Warren and told him he and Levi, an agent of said Clark, were round trying to get some policies and wanted to know if he (Warren) would like one. The rate that Clark would charge was then talked over. Clark asked him how his property stood, and W. told him he owned every thing free and clear, with the exception of \$400 due on the contract, and that Warren, the vendor of the land owed him (W.) enough, if he paid it up, to have it all free and clear. W. further told C. that he had erected the buildings, and their cost.

It was also proved that Clark returned to Watertown, filled out the policy and sent it to Levi, who delivered it to Warren.

Warren had no knowledge of the contents or conditions of the policy when the conversation at Carthage was had with Clark.

The policy speaks of an application of the assured as forming a part of it, and as being a warranty on the part of the assured, but no application was produced or proved on the trial.

We must assume the fact to be that no application was made by the assured except a verbal one, and that the defendant's agent inserted in the policy a description of the property without the knowledge of the assured, and without stating therein the nature of the title or interest of the assured in the property communicated to him by Warren.

The assured, at the time he made the application to Clark to insure his property, had no knowledge of the provisions of the policy, and could not know that by it, Clark, in taking the application, was to be deemed his agent and not the agent of the company. He had the right to treat Clark as the agent of the company, and possessing the power to agree upon the amount of premium to be paid to fill up the policy and to deliver it to him as an operative instrument.

It was Clark's duty to insert in the policy the nature of Warren's interest in the property, as it had been disclosed to him, and failing to do it the defendant is estopped from objecting to the validity of the policy by reason of such omission. (*Baker v.*

*The Home Life Ins. Co.*, not reported, opinion by ALLEN, J.; *Insurance Co. v. Wilkinson*, 13 Wall., 222.)

But it is said that, by the terms of the policy, Clark was the agent of Warren, and not of the defendant. He would have been so had Warren known that the policy contained such a provision, but he did not.

He treated Clark, in the proceedings to effect an insurance, as the agent of the company, and gave him all the information necessary to enable him to propose a valid policy. Clark, if he had ever read the policy issued to a person insured by defendant, knew that he was not the agent of the defendant, but was the agent of the insured. The company, therefore, and not the insured, should bear the consequences of the blunder of the agent.

The conditions of the policy, as to the insertion therein of the notice of insured's interest in the property, if less than a fee, was never in force as between Warren and the defendant. It was never known or assented to by him. (*Rowley v. The Empire Ins. Co.*, 36 N. Y., 550.) The judgment must be affirmed.

Present—MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed.

# MEMORANDA

OF

## CASES NOT REPORTED IN FULL.

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RUSSELL SUNDERLIN, RESPONDENT, v. JOHN A. WYMAN,  
APPELLANT.

*Chattel mortgage — certified copy of — admissible as evidence of the date of filing,  
but not of the existence and execution of the mortgage.*

**APPEAL** from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

The action was brought for the conversion of two pairs of horses and two single horses, of which plaintiff claimed to be the owner.

The plaintiff claimed title by virtue of a sale under a chattel mortgage, and the defendant, by a sale under an execution upon a judgment recovered against the owner.

Upon the trial, the plaintiff gave in evidence a copy of the chattel mortgage, certified by the register of the city of New York, in whose office the original was filed.

With reference to this, the court at General Term said: "On the trial, the plaintiff offered in evidence a copy of said mortgage, duly certified by the register of New York, in whose office the original was filed, together with the certificate of the clerk of the city and county of New York, that the officer taking the acknowledgment of said mortgage was a notary public of said city, duly commissioned and sworn.

The defendant's counsel objected to the certificate of the register, that it was not evidence of the time of filing. The objection was overruled, and defendant's counsel excepted.

The register is not presumed to know that the paper he found on file was the original mortgage. He could certify only that a paper, describing it by its number, or the names of parties, etc., was on file, and the time of filing entered thereon.

A copy of a mortgage certified by the officer in whose office it is filed, does not prove the existence and execution of the original mortgage. (*Bissell v. Pearce*, 28 N. Y., 252.)

The original must be produced, and when produced, the time of filing, if it was filed, will be proved. If a copy only was filed, a duly certified copy of the copy, with the time of filing noted thereon, will prove the filing of such copy.

"The defendant's counsel did not object that the original was not produced. He must be held, therefore, to have accepted the certified copy in lieu thereof, and the time of filing the copy was, therefore, proved. He cannot, on the argument of the appeal, insist upon any objection not taken at the trial, unless it be one that could not have been obviated had it been raised. The objection that the certificate does not, in terms, set forth that the original mortgage was filed, and that the paper produced is not proof of the execution and filing of the mortgage, might have been obviated had they been raised."

*H. C. Kingsbury*, for the appellant. *Morris & Russel*, for the respondent.

Opinion by MULLIN, P. J.

Present—MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed.

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PETER BURNS, RESPONDENT, v. EDWARD J. O'NEIL,  
APPELLANT.

*County Court*—allegation as to defendant's residence, where an action is brought in  
— what sufficient — Allegations in pleadings — relate to time of beginning suit.

APPEAL from a judgment of the Monroe County Court in favor of the plaintiff, and also from an order of said court denying a motion for a new trial on a case containing exceptions.

This was an action for assault and battery. The action was commenced by the service of a summons to answer the complaint, a copy of which was stated in the summons to be annexed thereto. The complaint averred that "the plaintiff and defendant are residents of the county of Monroe."

The court at General Term said: "At the close of the plaintiff's testimony, the defendant's counsel moved for a nonsuit on two grounds, only one of which need be noticed, to wit, that the court had not jurisdiction of the action. The reason assigned was, that the complaint does not allege that the defendant was a resident of the county of Monroe, at the time of the commencement of the action. The statute gives County Courts jurisdiction in civil actions for the recovery of money, not exceeding \$1,000, or of personal property not exceeding that sum in value, in which all the defendants are residents of the county in which the action is brought, at the time of its commencement. (Laws 1870, ch. 487, p. 1041, § 1.) The allegation in the complaint, as to the residence of the defendant, is sufficient. The complaint having been served with the summons when the suit was commenced, the averment in it that the plaintiff and defendant 'are' residents, etc., has reference to the time of the commencement of the suit. In *Frees v. Ford* (2 Seld., 176), cited by the appellant's counsel, the declaration contained no allegation, whatever, as to the defendant's residence."

*Wm. J. Sheridan*, for the appellant. *Townsend & Sullivan*, for the respondent.

Opinion by SMITH, J.; MULLIN, P. J., and TALCOTT, J., concurred.  
Judgment and order affirmed.

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BENJAMIN A. MERRILL, APPELLANT, v. ENSIGN L.  
CALKINS AND ANOTHER, RESPONDENTS.

*Easement — right to use water from spring on another's land.*

APPEAL from a judgment in favor of the defendants, entered on the report of a referee.

The action was brought to recover damages for tearing down and removing part of a dam erected by the plaintiff, and for an injunction.

The plaintiff owns a village lot on the east side of Furnace street, in Wolcott, nearly opposite a spring of water on premises situated on the west side of the street, belonging to the wife of the defendant

Calkins. On and prior to May 12, 1821, Jonathan Melvin owned a large tract of land, including both parcels above mentioned. On that day he deeded to William Clark the lot now owned by the plaintiff, described by metes and bounds, "and also the privilege of raising the water at the spring above-mentioned, and conveying the same in such a direction as may be most convenient to the premises conveyed by said deed, in such quantities as shall be necessary to supply a tannery which shall be hereafter erected on the premises above described, and for such other uses on said premises as may be necessary, nevertheless reserving to the said Melvin water forever necessary for the uses of said Melvin's farm."

The plaintiff derives title from Clark. Mrs. Calkins claims through a deed executed by Melvin subsequently to his deed to Clark. The spring in question is about twenty-five feet west of the highway, and issues out of a bank forming the westerly boundary of a basin about two rods wide, extending from a point twelve or fifteen rods south of the spring to the highway. South of said spring are other springs in said basin, the waters of which flow in a north-easterly course, and after uniting with the water from the spring in question, discharge in a natural channel under the highway and across the north-west corner of the plaintiff's premises. There never was a tannery on the plaintiff's lot, and the waters of the spring were never raised or conducted to his premises, except by their natural channel. In the summer of 1876, the plaintiff built a dam about thirty inches in height, across the basin at the west line of the highway, and below the point where the waters from the spring in question run into the stream from the springs above, and thereby obstructed and raised the water from all the springs and overflowed the spring in question, and about five or six square rods of Mrs. Calkins land. The spring was thereby filled with mud and sediment, and its water was rendered unfit for domestic use, but continued fit for watering animals.

The referee decided that the complaint should be dismissed with costs.

The court at General Term said: "The right of the plaintiff to use the water flowing from the spring on Mrs. Calkins' land, subject to the reservation contained in the deed from Melvin to Clark, is undoubted. His right to such use does not depend on the erection



of a tannery upon his lot, nor is it limited to the use of the water for the purposes of a tannery. He may use the water for any purpose on his own premises, provided he uses no more than is given by the grant (*Cromwell v. Selden*, 3 N. Y., 253; *Wakely v. Davidson*, 26 id., 387; *Comstock v. Johnson*, 46 id., 615), and his right being created by deed, is not lost by non-user.

The deed gives him the right to raise the water and convey it in the most convenient direction to his premises. But by the terms of the grant, he can only raise the water *at the spring*. If he raises it by means of a dam, he has no right to obstruct the flow of the water of the other springs, or to overflow the lands of Mrs. Calkins any further than is necessary to the enjoyment of the right given by the deed.

He may undoubtedly erect a dam at the spring for the purpose of raising the water, and he may carry the water from that point to his premises. Consequently, he has also the right to enter upon the land adjacent to the spring for the purpose of constructing and keeping in repair a dam and pipes, or other suitable means for raising and conveying the water, doing no unnecessary damage. It is a maxim of the law, that the grant of a thing carries with it, that without which the grant would be of no effect. (Angell on Water-courses, § 158, and cases there cited; *Oakley v. Stanley*, 5 Wend., 523.)”

*Wm. Roe*, for the appellant. *Anson S. Wood*, for the respondent.

Opinion by SMITH, J.; MULLIN, P. J., and TALCOTT J. concurred.

Judgment affirmed, with costs.

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## HIRAM POOL ET AL. v. ALBERT E. SAFFORD.

*Chamber order of county judge — appeal from — can only be taken after order has been entered in the county clerk's office.*

APPEAL by a receiver in the above-entitled action appointed in supplementary proceedings, from an order said to have been made at chambers, by the county judge of Cattaraugus county, that the said receiver account and show cause why an attachment should not issue against him for contempt.

The court at General Term said "The original judgment under which the supplementary proceedings were instituted, was recovered in the Supreme Court. The said order, if reviewed by this court, is to be reviewed in the same manner as if made by a judge of the Supreme Court. (Code, § 403.)

Such an order, made out of court, cannot be reviewed on appeal, unless entered with the clerk of the court. (Code, § 350.)

The case contains no evidence that the order appealed from has ever been entered anywhere, and there is no evidence, such as the statute requires, that any such order has been made. Consequently, this court has no jurisdiction to act upon the appeal, which must therefore be dismissed."

*J. M. Congdon*, for appellant C. E. Marsh, receiver. *C. Z. Lincoln*, for S. C. Green, respondent.

Opinion by TALCOTT, J.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Appeal dismissed, with ten dollars costs and disbursements.

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SOLOMON SCHEU, RESPONDENT, v. ERIE RAILWAY COMPANY APPELLANT.

*Common carrier — delivery of goods to wrong person — liability for — distinction between liability of common carrier and warehouseman.*

APPEAL from a judgment entered on the decision of a single judge of the Superior Court of Buffalo, and transferred to this court by order, pursuant to Laws of 1873. (Ch. 239, § 7.)

The action is brought to recover damages for the alleged wrongful delivery of a quantity of malt belonging to the plaintiff, which the defendant, as a common carrier, received at Lancaster, Erie county, and undertook to transport and deliver to the plaintiff's consignees, at Newark, New Jersey. The court found that the malt was consigned to the firm of C. Weidenmeyer & Sons, Newark, New Jersey, and that the defendant failed to deliver it to that firm, but wrongfully and negligently delivered it to the firm of C. Weidenmeyer's Sons, at Newark, and that the latter firm was not the con-

signee or owner of the malt or entitled to receive it; that the latter firm was insolvent, and the plaintiff has not received pay for the malt, but, by reason of such wrongful delivery, has lost the same. The court ordered judgment for the plaintiff for the value of the malt.

The court at General Term said: "Upon the facts found, the judgment is clearly right. If a common carrier deliver goods to a wrong person, although by his own innocent mistake, or by his being imposed upon, he is liable to the true owner for the value. Such wrongful delivery is treated in the common law as a conversion of the property. (Story on Bailments, § 545, *b*; *McEntee v. New Jersey Steamboat Co.*, 45 N. Y., 34.) The carrier delivers at his peril. He is responsible as an insurer. His liability differs from that of a warehouseman, who is held only to the exercise of proper diligence and care in the preservation of the property and its delivery to the true owner. (*Price v. Oswego and Syracuse R. R. Co.*, 50 N. Y., 213, per GROVER, J., p. 217.) When goods are safely conveyed to the place of destination, and the consignee is dead, absent, or refuses to receive, or is not known, and cannot, after reasonable diligence, be found, the carrier may be discharged from further responsibility as carrier, by placing them in a proper warehouse for, and on account of the owner (*Fisk v. Newton*, 1 Den., 45); but until discharged in that manner, his responsibility as carrier continues. (*Price v. R. R. Co.*, *supra*.)

*Sprague, Gorham & Bacon*, for the appellant. *Humphrey & Lockwood*, for the respondent.

Opinion by SMITH, J.; MULLIN, P. J., and TALCOTT, J., concurred.

Order affirmed, with costs.

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127 378ALBERT HAYWOOD AND SPENCER L. BAILEY v.  
JAMES V. H. JONES*Usury — must be pleaded.*

MOTION by the defendant for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a verdict in favor of the plaintiffs, directed by the court.

The action was by the indorsees against the maker of a promissory note. The defense was that the note had never been delivered, and had no legal inception. It appeared that the note had been wrongfully taken from the maker's possession by one Lewis, who sold it to one Lowry at a usurious discount. Subsequently the plaintiffs purchased the note from Lowry. Upon the hearing at the General Term, it was urged that the usury affecting the transfer of the note to Lewis rendered it void. With reference to this the court at General Term said: "It is said that the note was usurious. If the question had been presented by the pleadings, so that it could have been litigated at the trial, it may be that the transaction with Lowry would have been adjudged usurious, as he advanced less than \$1,000 for the note. And, of course, the note, if usurious in its inception, would have been void in the plaintiff's hands. But the defense of usury is not available to the defendant, as against the plaintiffs in this action, because it is not pleaded. It is a well-established rule of pleading, founded on the plainest considerations of justice, that where a contract or other cause of action, valid on its face, has been assigned, the defendant should not be permitted to defeat the plaintiffs' claim, on the ground that the contract was void in its inception, by reason of fraud, illegality, or the like, without apprising him specifically of the facts relied on to establish such defense. Especially does this rule apply in respect to the defense of usury, the effect of which, if sustained, is to set aside the entire contract, and to deprive the party purchasing of even the money advanced. (*Fay v. Grimstead*, 10 Barb., 321; *Gould v. Horner*, 12 id., 601; *Watson v. Bailey*, 2 Duer, 509; *Scott v. Johnson*, 5 Bosw., 213, 224; *Mechanics' Bank of Williamsburgh v. Foster*, 44 Barb., 87.)

The printed case with which we are furnished does not show that

the question of usury was even suggested at the trial. The testimony respecting the amount advanced by Lowry for the note was called out by the defendant after he had rested his defense, and had resumed the case in order to reply to testimony introduced by the plaintiffs tending to show that they purchased in good faith.

The defendant's counsel cites the cases of *Hall v. Wilson* (16 Barb., 548) and *Sweet v. Chapman* (7 Hun, 576). In the latter the defense of usury was pleaded. In *Hall v. Wilson*, a promissory note, tortiously obtained, was sold by the wrong-doer to one Bigelow at a discount, and by him transferred to the plaintiff without consideration. The case is distinguishable from the one in hand by the very material circumstance that there the plaintiff, not having parted with value, stood in Bigelow's shoes, and was affected by whatever impeached his good faith. And on that ground the case was decided. (Op. of ALLEN, J., 555.) But upon the point that the defense of usury, to be availed of, must be pleaded, the case is in accord with the other authorities above cited."

*W. F. Warren*, for the plaintiffs. *Jenkins & Cameron*, for the defendant.

Opinion by SMITH, J.; MULLIN, P. J., and TALCOTT, J., concurred.

New trial denied, and judgment for plaintiff ordered on verdict.

Cases  
DETERMINED IN THE  
THIRD DEPARTMENT  
AT  
GENERAL TERM,  
May, 1877.

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GAYLORD WILLSEY, RESPONDENT, *v.* HARRIET S.  
HUTCHINS, IMPLEADED, ETC., APPELLANT.

*Married woman — promissory note of — what constitutes a benefit to her separate estate.*

The defendants, husband and wife, executed a valid agreement in writing with one Adams, which provided that he should convey to them or to the husband the right to use and vend a certain patented article in Iowa and Missouri, and that the wife should convey to him a farm owned by her, he giving back a mortgage thereon for the difference between the price of the patent right and the value of the farm. Subsequently, the wife desiring to be released from her contract to convey the farm, executed a note and delivered the same to Adams, who thereafter transferred the same to the plaintiff.

In an action on the note against the wife it was insisted that the husband was the sole purchaser of the patent right, and that the wife was merely a surety. *Held*, that as the wife had legally bound herself to convey the land to Adams, her release from such obligation was a benefit to her separate estate sufficient to sustain the note.

Since the statutes of 1860 and 1863 the executory contract or note of a married woman is *prima facie* valid, and the special facts establishing her liability as a married woman need not be alleged in the complaint.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee, and from an order of the Tompkins County Court denying a motion for a new trial.

Harriet S. Hutchins and Charles H. Hutchins, husband and wife, entered into negotiations with G. W. Adams for the purchase of an interest in a patent steam-washer.

An agreement in writing was executed by the several parties, by which it was provided that Adams should convey to Hutchins and his wife or to the former (there being a dispute upon this point) the right to use and vend the patented article in Iowa and Missouri, and that Harriet S. Hutchins should convey to Adams a farm owned by her, and that he should give back a mortgage thereon for the difference between the price of the patent right and the value of the farm. Thereafter, the wife wishing to be released from her contract to convey the farm, executed to Adams the note on which this action was brought. Subsequently the note was indorsed by Adams to the plaintiff.

The present action was commenced against Harriet S. Hutchins and Charles H. Hutchins, in the Justice's Court, from the decision of which an appeal was taken by the defendant Harriet S. Hutchins, to the County Court of Tompkins county, where the judgment below was affirmed.

*Jerome Rowe*, for the appellant.

*Ferris & Dowe*, for the respondent.

BOARDMAN, J.:

The sole question presented for our decision arises upon the motion for a nonsuit at the close of the evidence. The other exceptions taken upon the trial are not urged, and no valid exception is taken to the decision of the referee. The note in suit was given by the defendants, who are and were husband and wife, to one Adams, and by him transferred to plaintiff before it became due. Adams had negotiated with the defendants for the sale to them, or one of them, of a patent right. The wife, Harriet S. Hutchins, appears to have been the owner of a farm in her own right. The result of the negotiations was that Adams contracted to sell the defendants some patent territory in Iowa and Missouri, to take the wife's farm and give her back a mortgage for the difference. Mrs. Hutchins appears to have made and subscribed such a contract with Adams, in which her husband and Adams joined. The terms and condi-

tions of this contract are proved by parol, the original contract not being produced. No objection to such mode of proof is made. But the fact is agreed upon by all that prior to the giving of the note in suit Mrs. Hutchins was bound by a valid written contract to sell and convey her separate real estate to Adams for the considerations, and on the terms and conditions therein mentioned and contained. It also sufficiently appears that Mrs. Hutchins became dissatisfied with the contract she had made with Adams, and wished to take up and cancel such contract. After some discussion it was agreed between the defendants and Adams that they would give Adams the note in suit, if he would surrender the contract for the farm. This was then done and the note afterwards transferred to plaintiff. The action was first brought in a Justice's Court, where judgment was rendered against both defendants. An appeal was taken to the County Court where, it may be inferred, an order of reference was granted. The foregoing facts were made to appear in a confused way before the referee. The defendant Mrs. Hutchins, I suspect, alone defended. At least the grounds upon which the motion for a nonsuit was founded applied not to Mr. Hutchins and could not avail for him. He had no defense to the action, so far as I can see, and the plaintiff was therefore entitled to judgment against him. But we will assume that Mrs. Hutchins was alone defending, and that the nonsuit was applied for by her only. It was asked for because, in substance, first, the debt was her husband's and she was his surety and had not, in terms, charged her separate estate with its payment; second, her signature was obtained by duress.

There is no evidence which would justify a nonsuit upon the ground of duress. So that at last the appeal turns upon the consideration for which the note was given. If the transaction constituted a dealing by Mrs. Hutchins in relation to or for the benefit of her separate estate, it may be enforced at law though she has not charged her separate estate with its payment. If it was not such a transaction, but she was a mere surety for her husband, the note, as to her, is a nullity. (*Second Nat. Bk. v. Miller*, 63 N. Y., 639; S. C., 2 T. & C., 104.)

The note was given to procure the discharge of the contract whereby the defendant Mrs. Hutchins had legally bound herself to



convey her lands to Adams, in exchange for patent right territory to be deeded to her or to her husband, or to both. I do not think it important who got the patent territory so long as the contract for the sale of the land by Mrs. Hutchins was binding upon her and capable of being enforced. Mrs. Hutchins was so bound. She desired to be relieved of that obligation. To accomplish that purpose she gave this note. The giving of the note had relation to, and was for the benefit of, her separate estate; it discharged such separate estate from the incumbrance and herself from the personal obligation created by such contract of sale. It is analogous to the giving of an ordinary note by a married woman in satisfaction of a mortgage upon her separate real estate. Such note must be valid against her. The consideration moves directly to the married woman and for the benefit of her separate estate. So I think the evidence sustains the finding of the referee in the following language: "That she (Mrs. Hutchins) was the owner of separate estate which she held in her own right; that the said note was so executed by her for a consideration moving directly from said Adams to the benefit of her separate estate." (*Prevot v. Lawrence*, 51 N. Y., 221; *Frecking v. Rolland*, 53 id., 422.)

Another objection was taken, that the complaint should have alleged the coverture of Mrs. Hutchins, the possession by her of a separate estate and that the note in suit was given for the benefit thereof, etc. But the case of *Smith v. Dunning* (61 N. Y., 249) settles that point adversely to the appellant's claim.

Prior to 1860 the right of a married woman to bind herself by her promissory note or other executory contract was denied, unless for the direct benefit of her separate estate, or the intent to charge such separate estate was stated in the contract. Since the statutes of 1860 and 1862 the executory contract or note of a married woman is *prima facie* valid, and the special facts establishing her liability as a married woman need not be alleged in complaint.

This is a case where I should have been glad to have come to a different conclusion. The venders of patent rights are entitled to little sympathy when they entice ignorant and humble people into the purchase of distant territories wherein the patent may be made and sold. Such purchasers are usually utterly incompetent to realize from the thing bought if it has any value, and sink into utter

helplessness when the patent vender and his gilded castles have withdrawn. These defendants seem to me such foolish and improvident purchasers, duped into the favorable consideration of an article probably valueless to them, and when committed beyond recall they are compelled to buy their release on the best terms possible.

But as I look upon the law and the facts, I am driven to the opinion that the judgment is correct.

The judgment and order are therefore affirmed, with costs.

Present — LEARNED, P. J., BOCKES and BOARDMAN, JJ.

Judgment and order affirmed, with costs.

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WILLARD E. CHASE, RESPONDENT, v. EDWARD D. JAMES,  
APPELLANT.

*Lien law — chap. 489 of 1873 — what a basis for a lien under — within what time notice must be filed.*

An entire contract for digging a cellar, erecting foundations, walls and piers and moving buildings upon such foundations and piers, and for materials furnished therefor, constitutes a basis for a lien under chapter 489 of 1873.

Under the fourth section of said act the notice is not required to be filed until sixty days after the performance and completion of the labor or final furnishing of the materials.\*

*Goodale v. Walsh* (2 N. Y. S. C. [T. & C.], 311); *Spencer v. Burnett* (35 N. Y., 94) distinguished.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

This proceeding was instituted under the mechanic's lien law, chapter 489 of the Laws of 1873. In the notice the plaintiff alleged that in the summer of 1873, he entered into an agreement with the defendant, to remove a house, barn and other buildings belonging to the defendant, and to build foundations under them, for which the defendant agreed to pay him a sum therein specified, but which sum he has failed to pay, although the work has been performed as agreed.

\* See *Tiley v. The Thousand Islands Hotel Company* (9 Hun, 424). — [REF.]

The defendant, by his answer, among other things, denied that the plaintiff had performed his contract, specifying particularly the provisions of the contract which the plaintiff had failed to perform.

The cause was tried before a referee. The referee found that the work was completed on the fifth of January; that the notice of the lien was filed within sixty days after that date, and gave judgment against the defendant for the full amount of the plaintiff's claim.

*E. H. Benn*, for the appellant.

*Jno. C. Hulbert*, for the respondent.

BOARDMAN, J.:

In this action, by which a mechanic's lien is foreclosed, the defendant alleges the following grounds of error:

First. That the removal of buildings is not an erection, alteration or repair for which the statute gives a lien.

Second. That no items can be secured by lien, except those for work done or material furnished within sixty days prior to the filing of the notice of lien.

Third. That there is no evidence in this case of any specific work done or materials furnished, within sixty days, prior to the filing of the notice.

Fourth. That there is no evidence of the completion of the work under the contract, in a manner to entitle the plaintiff to recover pay therefor.

I will consider these questions in their order: In *Hubbell v. Schreyer* (15 Abb. [N. S.], 300), the Court of Appeals have held that the mechanic's lien law is to be treated as a remedial statute, and not to be so strictly construed as to deprive creditors of the benefit intended to be conferred. Following that authority, I concur with the referee in holding that an entire contract for digging a cellar, erecting foundations, walls and piers, and moving buildings upon such foundations and piers, and the materials furnished therefor, constitutes a basis for a lien under the Law of 1873 (chap. 489, § 1). Labor in erecting, altering or repairing any house, building, or the appurtenances to any house or building, or materials furnished therefor, within the fair intent and meaning of the legis-

lature, include such work as was done by the plaintiff in this case.

The second point is untenable. The fourth section of the act of 1873 provides for the filing of the notice within sixty days after the performance and completion of the labor or final furnishing of the materials, in order to create a lien for the amount of the claim for such work or materials. The view contended for by the defendant and sustained by the cases of *Goodale v. Walsh* (2 T. & C., 311) and *Spencer v. Barnett* (35 N. Y., 94) arose under statutes requiring the notice to be filed within sixty or thirty days after the materials were delivered or work done. Hence, in those cases, no work or materials were protected and secured by the notice, except such as were done or furnished within the sixty or thirty days before the filing of the notice.

The evidence sustains the referee's finding that the last work was done on the 5th of January, 1874. It is true that the plaintiff, according to the evidence in the case, at one place says the work was finished December 5, 1873; at a later day, he denies having so stated, and fixes the date January 5, 1874. Evidently, the work was not completed December fifth, because it abundantly appears that the piers for the house were built December 20, 1873, and other evidence shows that the corn crib was moved after that date. I do not think it was necessary for the plaintiff to have been more specific as to the nature and kind of work done in January, 1874.

The fourth ground of error substantially asserts that the allowance of plaintiff's claim is against the weight of evidence; that the plaintiff did not, by a preponderance of evidence, establish his right to recover any thing of defendant, and that, by his substantial failure to perform his contract, he ought not to recover. I have carefully read the evidence; in many respects it is conflicting. The referee has passed upon such conflicting evidence and found in favor of the plaintiff. There is abundance of evidence to sustain such conclusion. Nor is there such preponderance of evidence in favor of the defendant's position, as would lead to the supposition that the referee was laboring under any mistake or passion or partiality. To reverse a judgment upon this ground, the wrong must be clear; the power is not to be exercised in doubtful or uncertain cases. It is not sufficient that the members of this court might think, from

the mere reading of the evidence, that they would have found differently. The referee sees the witnesses and hears their evidence. Many things are seen and heard on the trial that greatly and properly affect the decision of the case on the facts, which cannot be put upon paper and returned to this court. The case must, therefore, be a very bald one which will justify our interference upon a controverted question of fact.

For the reasons stated, the judgment should be affirmed, with costs.

Present — LEARNED, P. J., BOCKES and BOARDMAN, JJ

Judgment affirmed, with costs.

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CHARLES L. HOWK, RESPONDENT, v. CORNELIUS B. BISHOP, IMPEADED WITH TALMADGE ECKERT, APPELLANT.

*Judgment — entry of, in action against two defendants where only one answers — Reversal of judgment, where one appeals — effect of — Execution — when set aside.*

In an action against Eckert as maker and Bishop as indorser of a promissory note, the former answered and the latter suffered a default; upon the trial a judgment was entered against both for damages and costs. Upon an appeal by Eckert the General Term reversed the judgment and granted a new trial. Upon the second trial Eckert was successful and recovered judgment against plaintiff for his costs. Subsequently plaintiff issued an execution against Bishop under the original judgment, in which was included the costs. Upon a motion to set aside the execution, *held*, that upon reversal of the former judgment none existed against Bishop under which an execution could issue, and that, in any event, Bishop could not be charged with the costs incurred by the defense interposed by Eckert.

APPEAL from an order of Special Term denying a motion made by the defendant Bishop to set aside an execution.

The action in which this judgment was entered was commenced upon a note made by the defendant Eckert to the order of the defendant Bishop for the sum of fifty-five dollars. The action was

## THIRD DEPARTMENT, MAY TERM, 1877.

against Eckert, as maker, and Bishop, as indorser. Eckert defended and Bishop suffered default. It was tried before a referee, who reported in favor of the plaintiff, and a judgment was accordingly entered June 18, 1873, for fifty-six dollars and seventy-nine cents damages and one hundred and forty-three dollars and eighty-four cents costs against both defendants.

The defendant Eckert appealed from this judgment to the General Term. The decision of the General Term was filed November 17, 1874, in the following language: "Judgment reversed, referee discharged and new trial granted, costs to abide the event."

On a new trial, in January, 1875, the defendant Eckert had a verdict.

The execution sought to be set aside was issued under the original judgment, and was tested April 7, 1875, after the reversal of the judgment, and the new trial and verdict for defendant.

The motion in this case was made by the defendant Bishop to set aside the execution.

*Wm. Lounsbury*, for the appellant.

*S. L. Stebbins*, for the respondent.

BOARDMAN, J.:

It is undoubtedly true that the General Term has power to reverse a judgment upon appeal as to one defendant and affirm it as to another. (*Geraud v. Stagg*, 10 How., 369; *Story v. N. Y. and H. R. R. Co.*, 6 N. Y., 86, note; Code, § 366; *Van Slyck v. Snell*, 6 Lans., 299; *Angell v. Cook*, 2 T. & C., 175; 4 Wait's Prac., 523.) But it does not follow that the power must be exercised because it exists. In the present case the judgment of \$200.63 was, in fact, reversed by the General Term. Such reversal left no judgment against the defendants or either of them. A new trial was granted to defendant Eckert, who alone appeared and defended. Upon such new trial the defendant Eckert succeeded and recovered a judgment for his entire costs against the plaintiff. Upon what principle of justice, then, would a court make Bishop, who had suffered a default in the action, pay to the plaintiff his costs incurred in an unsuccessful contest with Eckert, while Eckert was at the same time collecting his own costs of his successful defense out of the plaintiff? The defendant Bishop did not

choose to take the risk of a litigation. He therefore did not appear in the action, but suffered default. The liability of Bishop was several as well as joint. The plaintiff therefore, upon proper proof, might have entered a separate judgment against Bishop, with costs, as upon a default, and have had execution thereon. Doubtless that may still be done. But the judgment against Eckert and Bishop having been reversed wholly, it cannot be made the basis of an execution against Bishop any more than it can against Eckert. I think the General Term did right in reversing the judgment as to both defendants. There is no reason why Bishop should be held to pay an erroneous judgment for costs because he suffered a default.

The record of judgment does not show any service of the summons and complaint upon Bishop, or any default on his part. Nor do such facts elsewhere appear, unless by implication. For this reason, also, it seems to me the execution is not sustained or justified by the judgment.

I think, therefore, that the order of the Special Term should be reversed, with ten dollars costs and expenses of printing, and the motion to set aside the execution should be granted, with ten dollars costs.

Present — LEARNED, P. J., BOCKES and BOARDMAN, JJ.

Order reversed, with ten dollars costs and printing, and execution set aside, with ten dollars costs.

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ALEXANDER S. HAYS, RESPONDENT, v. RICHARD H. SOUTHGATE AND CHARLES F. SOUTHGATE, APPELLANTS.

*Promissory note — action upon — Title of plaintiff — denial of.*

Upon the trial of this action, brought against the maker and payee of a promissory note, the plaintiff read in evidence the note signed by the maker and indorsed in blank by the payee. The defendants set up in their answer, and offered to prove upon the trial, that the note was never transferred to the plaintiff; that he was not the legal owner or holder thereof, and that he was

not the real party in interest, but that the Saratoga Bank was the real party in interest and the owner of the note. *Held*, that as these facts, if proven, would constitute no defense to the action proof thereof was properly rejected. (LEARNED, P. J., dissenting.)

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action at the Circuit.

*Carr & Peters*, for the appellants. The plaintiff must be the real party in interest. (*Tamisier v. Cassard*, 17 Abb., 187; *Killmore v. Culver*, 24 Barb., 656; *Sanford v. Sanford*, 45 N. Y., 723; *Metropolitan Bank v. Lord*, 1 Abb., 185; S. C., 4 Duer, 630; *Flood v. Reynolds*, 13 How., 112; *Duncan v. Lawrence*, 6 Abb., 304; S. C., 3 Bos., 103; *Clark v. Phillips*, 21 How., 87; *James v. Chalmers*, 6 N. Y., 215.)

*Putnam & Huestis*, for the respondent. The holder of a note payable to bearer, or indorsed in blank, may sustain an action, although in fact not the owner. (*Lovell v. Evertson*, 11 John., 52; *Gage v. Kendall*, 15 Wend., 640; *City Bank of New Haven v. Perkins*, 29 N. Y., 554; *Devol v. Barnes*, 2 W. Dig., 384; *Brown v. Penfield*, 36 N. Y., 473; *Williams v. Brown*, 2 Keyes, 486; *Eaton v. Alger*, 47 N. Y., 345; *Allen v. Brown*, 44 id., 228; *Cummings v. Morris*, 25 id., 625.)

BOARDMAN, J.:

This is an action on a promissory note against the maker and indorser. The defendants, by their answer, deny that the note was ever transferred to the plaintiff or that he is the legal holder or owner thereof, or that he is the real party in interest, and allege that the Saratoga Savings Bank is the real party in interest and the owner and holder thereof, and should be plaintiff. On the trial, the plaintiff produced and read in evidence the said note, signed by the maker and indorsed in blank by C. F. Southgate, defendant, the payee in said note named. After proving the amount due thereon the plaintiff rested. The defendants thereupon offered to prove the facts set up in their answer. The evidence was rejected and defendants excepted. This presents the only question for review. The defendants claim the answer states facts constituting a defense, and that the court erred in holding to the contrary.



The case of *The City Bank of New Haven v. Perkins* (29 N. Y., 554) seems to be a conclusive authority against the defendants. The learned judge in that case says: "The defendant stands here as a mere volunteer in behalf of others not before the court, and who make no claim on their own account. Confessedly he owes the debt. \* \* \* It will be time enough to determine whether any other person has a better title, when such person shall come before the court to claim the bills in question or their proceeds from the plaintiffs." Again, "Nothing short of *mala fides* or notice thereof will enable a maker or indorser of such paper to defeat an action upon it by one who is apparently a regular indorsee or holder, especially when there is no defense as to the indebtedness." Again, "The title is good as against the defendant and that is sufficient. If there are any others who claim a title to the instruments superior to that of the plaintiffs it can be determined whenever they come before the court to assert it." To the same effect are *Brown v. Penfield* (36 N. Y., 473); *Cummings v. Morris* (25 id., 625); *Devol v. Barnes* (7 Hun, 342); *Eaton v. Alger* (47 N. Y., 345).

The plaintiff, holding this note indorsed in blank, might lawfully have made the note payable to himself, in which case it would have given to him a title which could only be divested by his subsequent indorsement. That would have made him the holder and owner in law. The effect is the same under a blank indorsement. That constitutes a written assignment of the security and makes the plaintiff the real party in interest under section 111 of the Code. (*Allen v. Brown*, 44 N. Y., 228; *Sheridan v. Mayor*, 4 Week. Dig., 28 [Ot. of Appeals], and cases cited.) In the latter case, HUNT, C., says: "In a case like this the whole title passes to the assignee and he is legally the real party in interest, although others may have a claim against him for a portion of the proceeds. The specific claim and all of it belongs to him. Even if he is liable to another as a debtor upon his contract for the collection he may thus make, it does not alter the case. The title to the specific claim is his."

In the absence of any allegation of *mala fides* in plaintiff's possession of this note, the cases cited establish the correctness of the ruling below and show that the facts stated in the answer do not, if proved, constitute any defense to this action.

The cases cited by the defendants, *Metropolitan Bank v. Lord*  
HUN—Vol. X. 65

(1 Abb., 185); *Flood v. Reynolds* (13 How., 112); *Duncan v. Lawrence* (6 Abb., 304); *Tamisier v. Cassard* (17 id., 187), arise on the sufficiency of answers denying plaintiff's ownership of the notes sued upon and setting up another owner. These were held to be issuable facts and to compel the plaintiff to prove his title. But they do not reach this case where a sufficient title has been proved on the trial. *Sheldon v. Parker* (3 Hun, 498) was decided on the question of *bona fides*. *Killmore v. Culver* (24 Barb., 656) must be considered as overruled by the cases cited. In *Sanford v. Sanford* (45 N. Y., 723) the defendant, as executor, claimed to be owner and holder of the note and entitled to the proceeds equally with the plaintiff, who was executrix under the same will.

On a careful examination of the authorities I am well satisfied that no error was committed by the learned judge who tried this case at the Circuit, and that the judgment should be affirmed with costs.

LEARNED, P. J. (dissenting):

I understand that it is settled that, in an action on a note, the plaintiff must have the legal title. (*Eaton v. Alger*, 47 N. Y., 345, and S. C., 57 Barb., 179; *Sheridan v. Mayor*, 4 Week. Dig., 28; Code 111.) On the other hand, if he has the legal title, then he is the real party in interest for the purpose of the suit, although the transfer to him was colorable (*Sheridan v. Mayor, ut supra*), although there might be equities against the plaintiff's assignor (*City Bank v. Perkins*, 29 N. Y., 554); or although the consideration of the transfer was inadequate (*Brown v. Penfield*, 36 N. Y., 475). In all of these three cases the plaintiff had the legal title. (See *Sanford v. Sanford*, 45 N. Y., 723.)

In the present case the possession of the note, with the indorsement of the payee, was *prima facie* evidence of the plaintiff's title. It was not conclusive. The defendants offered to prove that the note was not the property of the plaintiff; that it had never been transferred to him, that it was the property of the Saratoga Savings Bank. Now, unless the defendant is to be precluded altogether from giving any evidence of a matter confessedly issuable, I do not see how this offer could be rejected. What he would have proved in fact, we cannot say. We must take his offer as good for all that

it proposed. Under the offer, for instance, he might have shown that the note had been accidentally lost by the Saratoga Savings Bank, and had been found by the plaintiff. The defendant's offer was to show that the legal title to the note was not in the plaintiff, but in another person named. We must assume that he could have shown this. If shown, it would have been a defense. It is possible that if the facts had been proved, they would not have shown that the plaintiff did not have the legal title. But we cannot determine that, on the offer.

The fact of legal title in the plaintiff is issuable. The plaintiff had given *prima facie* evidence of this fact. There was no estoppel to prevent the defendant from disproving this fact, and he offered to do so.

I think the judgment should be reversed and a new trial granted.

Present — LEARNED, P. J., BOOKES and BOARDMAN, JJ.

Judgment affirmed.

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JOHN M. FRANCIS AND HENRY O'R. TUCKER, PLAINTIFFS, v. THE CITY OF TROY, DEFENDANT.

*City of Troy — powers of common council — city advertising — notices of tax sales.*

The charter of the city of Troy confers upon it the right to collect taxes. *Held*, that the power to determine the extent to which notices of sale of property for non-payment of taxes should be published was conferred upon the city as incidental thereto.

The charter authorized the common council to appoint four official papers "in which the city advertising" should be done. *Held*, that the notices of sale of property for non-payment of taxes was city advertising within the express language of the charter.

The charter requires the chamberlain to publish such notices in two of the official papers. *Held*, that this did not affect the right of the common council to direct their publication in the two other official papers. (LEARNED, P. J., dissenting.)

SUBMISSION of a controversy without action, pursuant to section 372 of the Code of Procedure.

The plaintiffs being the publishers and proprietors of the Troy Daily Times presented to the city of Troy a bill for \$266.25, properly made out and verified, for publishing in said newspaper the city chamberlain's list or statement of unpaid taxes and assessments and notice of sale for non-payment once a week, for six weeks successively, commencing May 1, 1876.

The defendant refused to pay the bill, on the ground that the publication in the Times was unauthorized by the chamberlain of the city and, therefore, not a valid obligation against the city.

On the 1st day of May, 1876, the said list or statement was published by the express direction of Benjamin H. Hall, the chamberlain of said city, under and in accordance with section 13, title 5 of the charter of the city of Troy, in two daily newspapers published in the city of Troy, to wit, the Troy Daily Press and the Troy Morning Whig, which said publication continued for six weeks.

The chamberlain did not direct or authorize the publication of his said list or statement in the Troy Daily Times.

When such publication commenced, and from that time to the present, the official newspapers of the city, as designated by the common council, consisted of the before-mentioned Press, Whig and Times and a weekly paper known as the Troy Northern Budget. The designation of these newspapers for this year by the common council was made on the 14th of March, 1876.

On the 4th of May, 1876, the common council formally adopted a resolution, directing all the advertisements and official notices emanating from the chamberlain and other heads of city departments to be published in all the official papers of the city.

*Robertson & Foster*, for the plaintiffs.

*R. A. Parmenter*, for the defendant.

BOARDMAN, J.:

Municipal corporations possess no powers but those expressly granted, those necessarily or fairly implied, those incident to the powers granted, and those essential to the objects and purposes of the corporation. (1 Dillon on Corp., § 55.) The power to collect

taxes is expressly given. The extent to which notices of sale of property for that purpose shall be published is incidental to that power. The object of the corporation is to secure the payment of its taxes. Whatever means may directly contribute to that result, may be employed as an incident to the power expressly conferred; in that view a publication of the notice of taxes unpaid might be published by the defendant under the incidental powers conferred by the charter.

But by Laws of 1873 (chap. 813, end of § 3, p. 1220) express authority is given to the common council to designate not exceeding four official papers having the largest circulation in the city "in which the city advertising shall be done only on the order of the common council." The notices issued and published by the plaintiffs in this case were plainly city advertising, and within the express language of the charter. The action of the common council in ordering the publication in plaintiffs' paper, which was one of the four papers designated as official papers, was therefore authorized. I conclude, therefore, that the city was bound to pay for this advertisement the amount claimed, because the city, by its proper authorities, had ordered the plaintiffs to publish the same, and because such order was justified by the express language of the charter. In the absence of such express grant of power, I think the ordering of such publication was an incident to the power of collecting the city taxes, and for that reason might be legally exercised.

The fact that the services were partly rendered, prior to the passage of the resolution of the common council, will not avoid the defendant's liability. The resolution was a ratification of plaintiffs' act, and an adoption of their services sufficient to establish the liability of the city. It is possible the designation of the plaintiffs' paper, as the official paper, on the 14th of March, 1876, was a sufficient order to justify the publication of the notice, as city advertising under the charter.

The chamberlain of the city is required to publish the same notice in two daily papers of the city. This was done, but plaintiffs' paper was not one of them. I do not think the obligation imposed upon the chamberlain has any thing to do with the question for our decision. It is not necessary for us to decide whether the expense

incurred by the common council can be added to that incurred by the chamberlain and charged against the property taxed to be paid by the tax-payer upon a redemption.

The plaintiffs' paper was one of the official papers of the city. It was such a paper as the charter required the tax lists to be published in. The tax list was city advertising; the tax lists or notices were published in plaintiffs' paper. The common council authorized and ratified such publication. The charter, fairly construed, authorizes such action of the common council.

It follows that the plaintiffs are entitled to recover of the defendants the sum of \$266.25, besides costs and disbursements, and judgment is ordered accordingly.

BOOKES, J., concurred.

LEARNED, P. J. (dissenting):

The only question is whether the authority given to the common council to designate four papers in which the city advertising shall be done, and their resolution directing all advertisements and official notices to be published in all the official papers, make the city liable to pay the plaintiffs for this work. Or whether, on the other hand, the provision as to the chamberlain's designation of two papers is to be held to restrict the publication to those two.

I think that in speaking of "city advertising" in title 2, section 3, the legislature must have referred to that large amount of necessary advertising for which no special provision was made. But in respect to the publication of the tax lists, a special provision was made. The power of designating the papers was given to the chamberlain. They were to be daily papers, while the official papers need not be daily papers. The purchaser was to pay the amount of the tax, interest and advertising, so that the expense of advertising was to become a lien on the land. There was, therefore, a good reason for limiting the amount of expense which should thus be incurred.

The provision of advertising in two daily newspapers is found in several places throughout title 4, which treats of the collection of taxes. And it seems to be part of a system on this subject, that all the notices connected with the collection of taxes should be pub-

lished in that number of daily newspapers, to be selected by the chamberlain.

It is reasonable, then, to understand that the authority given in a previous title to the common council, to designate not to exceed four newspapers in which the city advertising should be done, was not intended to override the subsequent provisions relative to the collection of taxes. The common council are not obliged to designate more than one paper, and that may be a weekly. Evidently such designation would not interfere with the chamberlain's duty as to taxes.

It is to be noticed also, that title 2, section 3, does not declare that all the city advertising shall be done in all the papers designated by the common council. It only declares that in these papers the advertising shall be done "only on the order of the common council." It was then such advertising as was not otherwise provided for by definite requirements of law, that the common council were to order to be done in official papers. It may be said that, although the common council need have made no order, yet, as they have ordered the publication, and it has been done, the city must pay. That of course depends entirely upon the question whether this publication by the chamberlain was a matter within the authority of the common council or not. If, as it seems to me, they had nothing to do with it, then it was nugatory for them to order the additional publication. The charter gave full notice to every one of the extent of their power, and showed that this was beyond it.

I think that the defendants should have judgment.

Present — LEARNED, P. J., BOOKES and BOARDMAN, JJ.

Judgment ordered for plaintiffs.

HOPESTILL ARMSTRONG AND SOLOMON ARMSTRONG,  
APPELLANTS, v. DE ETTE WING, RESPONDENT.

*Action against heir at law of deceased grantor, for breach of covenant — when maintainable.*

In order to maintain an action against the heir at law of a deceased grantor, to recover damages occasioned by the breach of a covenant contained in a conveyance made by the ancestor, it must be shown that the deceased left no personal property within this State, or that the same was insufficient to pay the debt, or that the debt could not be collected from the personal representatives of the grantor, or from his next of kin or legatees.\*

A defendant cannot be charged both as heir-at-law and next of kin in the same count of a complaint.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court without a jury.

Hopestill, Solomon, Farrand S., David M., Morrey W. and Charles H. Armstrong were the owners, as tenants in common, of a certain farm. Hopestill, Solomon and Farrand S. contracted, by parol, to convey their undivided half for \$4,000 to Morrey W., David M. and Charles H., the vendees entering into possession. A joint deed was drafted for the three vendors and their wives to execute, which contained the following covenant:

"And the said Farrand S., Hopestill and Solomon Armstrong do hereby covenant and agree to and with the said parties of the second part, their heirs and assigns, that the premises thus conveyed in the quiet and peaceable possession of the said parties of the second part, their heirs and assigns, will forever warrant and defend against any person whomsoever, lawfully claiming the same or any part thereof."

Farrand S. Armstrong executed, acknowledged and delivered the deed, received his share of the purchase-money and died. After his death Hopestill and Solomon and their wives executed, acknowledged and delivered the deed with full knowledge that the wife of Farrand S. had not executed it. Farrand's wife never executed the deed, and afterwards, by action, recovered her dower in the farm. The vendees recovered a judgment against Hopestill and Solomon, surviving vendors, for the damages sustained by the eviction, which was paid.

\*This is in harmony with *Slover v. Cos* (63 N. Y., 488), decided after the decision of this case at the Special Term.



Hopestill Armstrong defended the action (at the request of the defendant, the sole heir at law of Farrand S., who promised to pay him the expense thereof), but Solomon Armstrong made default.

Farrand S. died intestate and letters were issued on his estate. He left a widow (since deceased), and this defendant, the sole heir at law, to whom descended real estate of about the value of \$3,000. The plaintiffs Hopestill and Solomon Armstrong bring this action to recover of the defendant, as heir at law, the damages they have sustained by reason of the breach of the joint covenant; also the expenses incurred in defense of the action.

The complaint also alleges incidentally, but not as a separate cause of action, that the defendant received considerable personal estate, as next of kin, of Farrand S. Armstrong.

The following opinion was delivered at Special Term :

FOLLETT, J. The debts of deceased persons upon covenant stand upon the same footing as simple contract debts. (Subdivision 3, 2 R. S., 453, § 37; 2 Edmonds' R. S., 478.)

The heirs of every person who shall have made any covenant or agreement are answerable, upon such covenant or agreement, to the extent of the lands descended to them, in the cases and in the manner prescribed by law. (1 Revised Statutes, 739, § 141; 1 Edmonds' R. S., 689.)

The heirs of every person who shall have died intestate shall respectively be liable for the debts of such person arising by simple contract or by specialty, to the extent of the estate, interest and right in the real estate which shall have descended to them from such person. (2 Revised Statutes, 452, § 32; 2 Edmonds R. S., 472.)

Heirs are not liable for any such debt unless it shall appear :

I. That the deceased left no personal assets within this State to be administered; or,

II. That the personal assets of the deceased were not sufficient to pay and discharge the same; or,

III. That after the proceedings before the proper Surrogate's Court, and at law, the creditor has been unable to collect such debt, or some part thereof, from the personal representatives of the deceased, or from his next of kin or legatee (2 R. S., 452, § 33, as amended by chapter 110, Laws of 1859; 2 Edmonds' R. S., 472), It is

incumbent on the creditor seeking to charge an heir to show the facts and circumstances required by the foregoing statutes to render the heir liable. (2 Revised Statutes, 453, § 36; 2 Edmonds' R. S., 472.)

The plaintiff has utterly failed to establish either of the before-mentioned statutory conditions precedent to a recovery, and on the contrary alleges (though incidentally), in his complaint, that the ancestor left considerable personal estate which was received by the defendant as next of kin. The evidence establishes the fact that letters of administration were issued upon the estate of Farrand S. Armstrong by the surrogate of Madison county, and that one of the representatives is still living. No evidence was offered upon the trial tending to show whether Farrand S. Armstrong left much or no personal estate, and no evidence as to the then condition of the estate or what had been done by the representatives in connection therewith was offered upon the trial, except a certificate of the surrogate's clerk that no proceedings had been had before that court, in the matter of that estate, since the granting of letters. This certificate, even if it be legal evidence of the fact recited therein, is not sufficient to bring this case within the statute. For aught that appears there are sufficient assets in the hands of the representatives to discharge the liabilities of the intestate.

This action cannot be maintained upon the ground that the defendant is liable, as next of kin, for the complaint contains no count charging a liability as next of kin. Before the Code it was held (*Gere v. Clark*, 6 Hill, 350) that a defendant could not be charged both as heir and next of kin in the same count, and the rule is the same under the Code, because the facts constituting these distinct causes of action are dissimilar. (2 Revised Statutes, 90, § 42, and 451, § 23; 2 Edmonds, 92 and 470.)

The action cannot be maintained upon the promise of the defendant to pay the expenses of the defense of the action against the plaintiffs in this action, because,

I. This action is not brought at law upon the promise, but in equity upon the statute to charge the defendant as heir thereunder.

II. The promise was not made to both of these plaintiffs but to Hopestill Armstrong, who alone defended the former action. No assignment of the promise is alleged and, indeed, Solomon has not

paid any portion of the expenses of the former action, having only paid one-half of the amount for which both were liable before suit brought and the unsuccessful defense interposed.

It is unnecessary to consider whether the covenant in the deed is a distributive covenant, or to consider the rights arising thereunder of the parties thereto.

Judgment for the defendant, with costs.

*S. S. Morgan*, for the appellants.

*Burdett & Brooks*, for the respondent.

BOARDMAN, J. :

The plaintiffs and the father of the defendant united, in 1859, in a deed of lands, with a joint covenant of warranty. The mother of defendant did not join in such deed. Upon the death of defendant's father, her mother brought an action and recovered her dower in the premises conveyed. An action was thereafter brought by the grantees in said deed against the plaintiffs in this action and they recovered of them, as survivors, the damages arising from such breach of the covenant of warranty. The defendant had notice of each of said actions and was requested to protect the interests of the defendant therein. The plaintiffs herein, after payment of the recovery against them, and after the death of defendant's mother, bring this action to recover of the defendant the amount paid and expended by them, in defending such action for breach of covenant for damages and costs. The theory of the complaint is, that the neglect of defendant's mother to sign the deed created an obligation or liability on the part of defendant's father to make good any defect of title caused thereby, and to indemnify his co-covenanters against the consequences thereof; that the defendant, as heir at law of her father, had received from him an amount of assets, real and personal, more than sufficient to satisfy plaintiff's claim, and thereby became responsible to the plaintiffs for the amount of their claim. These facts have been found in the decision of the case, but it was held that upon the facts found the defendant was not liable. The review of the judgment is solely upon the facts as found at the Special Term.

In the view taken of the case at Special Term, in which I concur,

it is unnecessary to consider whether the claim of the plaintiffs is a debt of defendant's father, for which she can be made liable under the provisions of the Revised Statutes. It will be enough to determine that she is not liable if we concede such to be the nature of the obligation.

The opinion of the learned judge at Special Term very clearly demonstrates, that the plaintiffs ought not to recover upon the facts found. I can add very little to the citation of authorities sustaining his conclusion. The Revised Statutes declare that the heir shall not be liable, unless the deceased left no personal property or such personal property was insufficient to pay the debt, or that, after proper proceedings in the Surrogate's Court, the debt could not be collected. (2 R. S. [Edm. ed.], 472; Bingham on Descents, 286, 290, 291; *Mersereau v. Ryerse*, 3 N. Y., 261; *Stuart v. Kissam*, 11 Barb., 271; *Roe v. Sweeney*, 10 id., 247; *Butts v. Genung*, 5 Paige, 254; *Wambaugh v. Gates*, 11 id., 505.) These authorities seem quite conclusive against plaintiffs in a claim against an heir for a debt of an ancestor. Such is the nature of this action. The complaint concedes the existence of personal property. Administration was granted. How much there was or what became of it does not appear. The lapse of time since administration granted cannot create any presumption. The conditions upon which an heir can be held liable are fixed by statute. Except by virtue of such statute the heir is not liable. It must therefore be strictly construed. (See the cases cited.) Nor does it make any difference that the heir in this case is the next of kin also, and was entitled to both the real and personal estate of her ancestor. (*Stuart v. Kissam*, ante.) The personal estate must be exhausted by proceedings against the administrator before the heir can be attacked. (11 Paige, 515; *Gere v. Clark*, 6 Hill, 350.)

The other reasons assigned by plaintiffs for a recovery are properly considered and disposed of by the opinion of the learned judge at the Special Term.

The defendant is not called upon in this action to contribute her just proportion of the recovery had against the plaintiffs who were co-obligors with her father. Several objections, not here considered, might in such an action arise. Did her father, in fact, ever deliver the deed? Was it left with the justice to be delivered after

it should have been duly signed and acknowledged by the parties named as grantors therein? In that case could the plaintiffs, by a subsequent execution and delivery of the deed without the signature of the defendant's mother, bind the father of the defendant, or herself through him? And finally, can plaintiffs, upon a recovery against them as the survivors upon a joint covenant, bring an action in equity against the heir at law of the deceased co-obligor for contribution? Some of these questions may prove to be of importance in possible future contingencies, but are not necessary to be determined in the case now presented for our decision.

I think the judgment of the Special Term was correct and should be affirmed, with costs.

Present — LEARNED, P. J., BOCKES and BOARDMAN, JJ.

Judgment affirmed, with costs.

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64	168

ALMERIN GALLUP, APPELLANT, v. GEORGE H. PERUE,  
RESPONDENT.

*Action for professional services — unliquidated demand — allowance of interest upon.*

In an action by an attorney against his client, to recover for professional services rendered by him, no bill having been presented and the demand being unliquidated, interest cannot be allowed upon the amount of the recovery from the time of the rendition of the services.

The statute fee-bill, although evidence bearing upon the question as to the value and amount of the services rendered, does not determine the question as between attorney and client.

*Van Rensselaer v. Jewett* (3 N. Y., 185) and *Adams v. Fort Plain Bank* (36 N. Y., 261) distinguished.

APPEAL from a judgment of the County Court of Schoharie county, reversing a judgment of a justice of the peace of that county in favor of the plaintiff.

*J. H. Clute*, for the appellant.

*N. P. Hinman*, for the respondent.

BOOKES, J. :

The action was brought to recover for professional services as attorney and counsel, with a small claim in addition for disbursements. The services were rendered in the defense of an action brought against the defendant, which terminated by trial in October, 1863. This action was commenced in September, 1869. No bill was presented to the defendant, and the claim remained unliquidated until the trial of this action, when a recovery was had, as on a *quantum meruit*, for work, labor and services, and interest was allowed on the assessed value of the services from October, 1863. The question here raised is as to this allowance of interest. The services were all performed under one retainer, but the demand for the services remained unliquidated, to be determined on proof of value, as no rate of compensation had been agreed upon between the parties. The statute fee-bill, although evidence bearing on the question, does not determine the value and amount as between attorney and client. (*Stow v. Hamlin*, 11 How., 452; *Moore v. Westervelt*, 3 Sandf., 762; *Garr v. Mairret*, 1 Hilton, 498; *Hadley v. Ayres*, 12 Abbott [N. S.], 240; *Easton v. Smith*, 1 E. D. Smith, 318.) The suit was therefore on *quantum meruit*, for work, labor and services. It was decided a half century since in *Reed v. Rens. Glass Factory* (3 Cow., 393) that interest was not allowable on an unliquidated claim for work, labor and services. This rule has been uniformly adhered to in all the courts of this state. (*Van Beuren v. Van Gaasbeck*, 4 Cow., 496; *Holmes v. Rankin*, 17 Barb., 454, and cases cited by WELLS, J., on page 456; *McMahon v. Erie R. R. Co.*, 20 N. Y., 463; *Hadley v. Ayres*, 12 Abbott [N. S.], 240; *Godfrey v. Moser*, 10 S. C. N. Y. [3 Hun], 218.) In each of the last two cases cited, the claim, like this now under consideration, was for professional services by attorney and counsel, and inasmuch as the recovery rested on a *quantum meruit*, it was held that interest was not allowable. The decisions in *Smith v. Velie* (60 N. Y., 106), and in *McCollum v. Seward* (62 N. Y., 316), accord with those above cited. The remarks of GROVER, J., in *Smith v. Velie*, on page 111, are in point here. The cases relied on by the plaintiff's counsel are *Van Rensselaer v. Jewett* (2 N. Y., 135) and *Adams v. Fort Plain Bank* (36 N. Y., 261). But the decision in those cases depended upon the peculiar facts disclosed in

them. In the former there was an express agreement to deliver certain specified property as rent, at a fixed time and place. Interest was allowed on the established value of the property by way of damages for a breach of the express agreement. This peculiarity in that case is noted by WELLS, J., in *Holmes v. Rankin* (17 Barb., on page 457), and by SELDEN, J., in *McMahon v. Erie R. R. Co.* (20 N. Y., on page 469). Judge SELDEN there points out the distinguishing feature of that case on the facts, and adds by way of caution, that the case went as far as was reasonable and proper to go in the allowance of interest on a demand, the amount of which was left to proof of value at the trial. The case of *Dana v. Fiedler* (12 N. Y., 40) is of the same character as that last cited. In *Adams v. Fort Plain Bank* effect was given to the finding of the referee that certain specified sums were due and owing at the time stated. So it was held that interest was allowable from such times. The finding of the referee as to this fact was a marked feature in this case, and controlled its decision on the question of interest. The Court of Appeals could not go behind the finding of fact, but was bound to accept it as a determination that the sums stated had become liquidated at the times fixed by the referee. GROVER, J., in *Mygatt v. Wilcox* (45 N. Y., 306), as I understand his opinion, vindicates the decision in *Adams v. Fort Plain Bank*, on the ground that the claim had become liquidated. (See also opinion in *Hadley v. Ayres*, *supra*.) It was not intended, as I think, to overrule or question the numerous cases above cited, or any of them, by the decision in *Adams v. Fort Plain Bank*. This is made apparent, I think, by the more recent cases above cited. (*Smith v. Velie*, 60 N. Y., 106; *Hill v. Burke*, 62 id., 106.) Thus it seems that neither *Van Rensselaer v. Jewitt*, nor *Adams v. Fort Plain Bank*, justify the allowance of interest in this case. The justice was, therefore, in error in allowing interest on the plaintiff's unliquidated claim for work, labor and services, and the judgment was for that reason properly reversed by the County Court.

Judgment of County Court affirmed, with costs.

LEARNED, P. J., and BOARDMAN, J., concurred.

Judgment affirmed, with costs.

JOHN SHEAR, RESPONDENT, v. DAVID VAN DYKE,  
APPELLANT.

*Evidence — statement by witness, of what was said to him by another witness before the trial — admissibility of.*

Upon the trial of an action, in which the question in issue was the number of loads of hay delivered at a particular time, a witness stated that he could not then remember the number, but that he knew it at the time and then told it to the plaintiff. Subsequently plaintiff was called as a witness and was allowed, against defendant's objection and exception, to state that the number was fourteen. *Held*, that the evidence was admissible. (LEARNED, P. J., dissenting.)

APPEAL from a judgment of the County Court of Albany county, in favor of the plaintiff, entered upon the verdict of a jury.

The action was originally brought in a Justice's Court, to recover damages for the breach of a contract in reference to gathering hay.

The plaintiff claimed he had made an agreement with defendant to help to gather all his hay, of which plaintiff was to have one-fourth for his services, and that defendant refused to allow him to help gather a portion.

Defendant claimed plaintiff was only to cut certain lots, which he did cut, except a part of one lot which defendant claims plaintiff refused to cut.

*J. H. Chute*, for the appellant.

*Hungerford & Hotelling*, for the respondent.

BOOKES, J. :

This action originated in a Justices' Court, and was retried on appeal in the County Court. An appeal was then taken to this court from the judgment rendered in the County Court.

It does not appear, from the record before us, that a motion was made in the latter court for a new trial. It was held in *Murray v. Vanderveer* (18 S. C. N. Y. [6 Hun], 302) that without such motion in the County Court, exceptions entered on the trial could not be considered in this court on appeal. And in *Tallman v. The*



*American Express Company* (13 S. C. N. Y. [6 Hun], 377) it was decided that no appeal would lie to the General Term in such case; that is, until the case and exceptions had been before the County Court on a motion for a new trial. In the former case the judgment was affirmed. In the latter the appeal was dismissed. If it be true, then, as the record before us indicates, that no motion was made for a new trial in the County Court, the judgment should be affirmed, without an examination of the case and exceptions made and settled.

But it is stated by counsel that such motion was, in fact, made and denied, and we will therefore examine the case under that suggestion.

It is not denied that a case was made for the jury on the evidence submitted by the parties. On this branch of the case no question is made. The verdict must consequently conclude the parties, if the case is to stand on the proof.

It is insisted, however, that errors were committed in the admission of evidence on the trial. First, it is urged that the court erred in allowing the witness to state what the defendant said as to the value of the hay, the subject in controversy between the parties. The witness stated that the defendant told him that he (defendant) considered every load of hay worth twenty-five dollars a ton. I think this was admissible. It was the statement or admission of the defendant called for by the plaintiff, and it bore on the subject under examination. It was, therefore, admissible evidence.

It is next urged that the court erred in allowing the question, whether the defendant gave any reason why he would not allow the plaintiff to go on and finish the contract, for an alleged breach of which the action was brought. The plaintiff had the right, if he chose to exercise it, to call for the defendant's statement or admission in this regard. The objection to this question was properly overruled. But the exception to the question has no importance, as no answer was given to it by the witness.

One other ground of error is here urged. A witness, who aided in taking in the hay, was asked how many loads were taken in on an occasion specified. He answered that he could not now remember, but that he knew at the time, and then told the plaintiff. The plaintiff was then called, and was allowed, against objection, to state

that the number of loads given him by the witness was fourteen. I am inclined to the opinion, contrary to my first impression, that this evidence was admissible. The witness noted the number of loads taken in at the time, and, as he stated, gave the number truly to the plaintiff. Now, the latter might state the number so sworn to have been given him. The evidence sought from him was original evidence. The question was as to the declarations made to him; not as to its truth or falsity. In this view it was not hearsay evidence. Had the witness given the plaintiff a memorandum of the loads at the time, and had he sworn that the memorandum so furnished was correct, the plaintiff then might have produced and verified the memorandum by his own oath. It has been repeatedly held that when a witness testifies that he made a memorandum correctly at the time the event occurred, but was unable to recollect the fact contained in it when examined in regard to the transaction, the memorandum may then be received in evidence of the fact therein stated. So in *Payne v. Hodge* (14 S. C. N. Y. [7 Hun], 612), the plaintiff testified that he made entries in accordance with statements made to him by other witnesses, and the latter testified that such statements were true; the evidence was held to be admissible. Now, in the case in hand, the fact sought to be proved comes verified by the oath of witnesses in a way that renders it definite and certain. Nor does it rest at all on any statement unsupported by a sworn witness. I am of the opinion that the evidence was properly admitted.

We think the allegations of error are not sustained, and hence the judgment should be affirmed with costs.

BOARDMAN, J. concurred.

LEARNED, P. J.:

The fact to be proved was the number of loads of hay. I do not think it was competent for one witness to testify that another witness told him what the number was, as affirmative proof of that fact. To state the familiar rules, "oral evidence must, in all cases whatever, be direct; that is to say, if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it."

A witness may refresh his memory by reference to certain kinds of documents, and he may testify to facts mentioned in such documents, "although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document."

I do not think that the statement of Cross to the plaintiff (to which the latter testified) was in any sense a memorandum or document. The propriety of admitting such evidence, when the witness has no specific recollection of the facts, depends greatly on the circumstances that the evidence thus given was *committed to writing*. To extend the rule, and when the witness has forgotten a supposed fact to allow proof of what he once said in regard to it, appears to me dangerous and contrary to settled principles. But the evidence, probably, did no real harm, and therefore, under section 1003 of the Code of Remedial Justice, I concur in affirmance.

Judgment affirmed, with costs.

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THOMAS S. PARKER, RESPONDENT, v. THE CITY OF  
COHOES, APPELLANT.

*Liability of municipal corporation, for excavations in streets — what precautions are required.*

The water commissioners of Cohoes, acting under authority of the law, made an excavation in one of the streets for the purpose of laying therein water pipes for general use, and placed sand and dirt in the vicinity thereof to be placed therein; at the end of the day barriers in the usual form, consisting of planks, extending from sidewalk to sidewalk, supported by barrels placed in the street, were erected to prevent vehicles from entering the street.

Subsequently, some person, without the authority or knowledge of the commissioners, removed one of the barriers, and a short time thereafter plaintiff, drove through the opening thus made, ran upon the obstructions, was thrown from his wagon and injured.

In an action by him to recover the damages sustained thereby, *held*, that the action could not be maintained, as the plaintiff had failed to show any negligence on the part of the commissioners. (LEARNED, P. J., dissenting.)

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

*Samuel Hand*, for the appellant. There was not the slightest proof of actionable negligence on the part of the defendant, either causing or contributing to the injury. (*Gorham v. Cooperstown*, 59 N. Y., 660; *McGinty v. Mayor of New York*, 5 Duer, 674; *Shear. & Red. on Neg.*, § 147.) The defendant, having caused proper and fit barricades to be put up sufficient to prevent attempts to pass, was not responsible for their removal or its consequences. (*Doherty v. Waltham*, 4 Gray, 596; *State v. Bangor*, 30 Maine, 34.) In order to make them liable for the consequences of such removal, some negligence of theirs, either of commission or omission, must have contributed thereto. They are not liable upon a guarantee that the barriers are to remain at all events, any more than they are that there shall be no obstructions in the street. (*Gorham v. Village of Cooperstown*, 59 N. Y., *supra*; *Doherty v. Waltham*, 4 Gray, *supra*; *Hart v. City of Brooklyn*, 36 Barb., 226; *McGinty v. Mayor of New York*, 5 Duer, 674; *Griffin v. Mayor of New York*, 5 Seld., 456.)

*Cranford & Fanning*, for the respondent. Where an excavation for a drain is made in a public street, proper precaution to the public requires not only a sufficient barricade, but that lights shall have also been placed thereon. (*Blake v. Ferris*, 5 N. Y., 48; *The City of Buffalo v. Holloway*, 7 id., 493; *Kasler v. The City of Ottumwa*, 34 Iowa R., 41; *Grant v. City of Brooklyn*, 41 Barb., 381; *Baxter v. Warner*, 13 Sup. Ct. R., 585.)

BOOKES, J.:

There is no exception in this case, by the appellant, to the referee's conclusion of law; hence there is no question before the court arising upon his report. (*Russell v. Dufon*, 4 Lans., 399, 406, 407; *Weed v. N. Y. and H. R. R. Co.*, 29 N. Y., 616; *Enos v. Eigenbrodt*, 32 id., 444.) Nevertheless, the exceptions taken during the trial and presented by the case, made and settled, are open to examination on the appeal. (*The Mayor v. Erben*, 24 How., 358, 359; *Cowen v. The Village of West Troy*, 43 Barb., 48; *Dainese v. Allen*, 45 How., 430.) A motion was made for a nonsuit when the plaintiff rested, and was repeated at the close of the case. The motion was denied, and the defendant excepted to the ruling. There

were also exceptions entered, by the defendant, on the rulings of the referee as to the admissibility of evidence. The appeal brings up these exceptions for examination.

The action was brought to recover damages growing out of the alleged negligence of the defendant. The proof showed that the water commissioners, acting under authority of law, made an excavation in one of the streets of the city, for the purpose of laying water pipes for public and general use; and in so doing, caused dirt and earth to be thrown out along the trench; and also brought into the street a heap of sand to be used in the work. At the close of the day, barriers were placed at the contiguous street-crossings, intended to give notice of the dangerous condition of the streets between those points, and to prevent persons traveling in vehicles from entering it. These barriers were of plank, and extended from sidewalk to sidewalk across the street, supported by barrels in or near the center in the usual manner of constructing temporary street barricades. Soon after the barriers were so placed, one of them was removed by some person without the defendant's agency or knowledge; and within a short time thereafter, and in early evening, the plaintiff passed with his horse and carriage through the opening made by the removal of the barrier, ran upon the obstructions in the street, was thrown from his carriage and sustained the injury for which the suit is brought. The evidence also showed, and the referee so found, in effect, that if the barrier had remained as placed, it would have given notice to the plaintiff of the danger to be apprehended in attempting to drive through the obstructed street; it would in fact have prevented his entering it. On this state of facts, the defendant moved for a nonsuit, insisting, as it is now insisted, that the evidence was insufficient to sustain the action. The making of the excavation by the water commissioners, for the purpose of laying water pipes for the public use, was pursuant to lawful authority. This position is not controverted. The excavation was not by a private person for his individual use. Thus the right of action must rest upon proof of some wrongful or negligent act of the defendant, or upon some omission of duty on which negligence may be predicated; for a municipal corporation is not a guarantor for the absolute safety of all persons traveling on the highway within the municipality. (*Gorham v. The Village of Cooperstown*, 59 N. Y.,

660.) What then was the wrongful or negligent act or omission of duty, here relied on as a basis of recovery? The answer is that the defendant left piles of earth and sand in the public street, without sufficiently guarding travelers against danger therefrom, or giving them reasonable and proper notice of the unsafe condition of the highway. Let us see how this answer is supported by the facts. It seems that the street was barricaded in a way sufficient to notify travelers of danger. So long as the barricade remained as constructed, travelers in vehicles were excluded or turned from the street. It was erected in the usual manner, and of ordinary material, and if left as erected, was a sufficient warning of danger to all persons who should attempt to pass that way. Indeed, if left as constructed, it would have excluded them from the street. It was not necessary that the barricade should have been made other than temporary, nor of such heavy material as to prevent its removal by human agency. The defendant was not bound to anticipate mischievous or wrongful acts on the part of others, hence was not required to guard against them, and omitting to do so was not negligence. The evidence shows that the barrier was of substantial material, and that it was erected in the usual way, having in view the temporary barricading of the street, while obstructed for a public and lawful purpose. It is urged that lights should have been placed along the line of obstructions. But this was quite unnecessary if the street was properly barricaded. Now, unless the defendant is to be held responsible for the removal of the barrier, certainly no liability was established. As regards this point, it appears that the defendant neither authorized its removal nor had notice of it prior to the accident. The defendant was not therefore in fault by reason of its absence. This point is decided in *Doherty v. The Inhabitants of Waltham* (4 Gray, 596). It was there held that if barriers were so placed at sunset as to protect travelers against an obstruction in the street, and to make it safe to persons using ordinary care and prudence, the municipal corporation was not responsible for an injury suffered during the same night by a passenger, by reason of the removal of such barriers, in the absence of reasonable notice of such removal. To the same effect is the decision in *McGinity v. The Mayor of New York* (5 Duer, 674). In this case, the injury resulted from a defective grating over a vault under the sidewalk. It is stated that it was found, upon examina-

tion, that a chain, which had secured the grate, was broken, but from what cause did not appear. DUEB, J., remarked that it did not appear that the defendants had any notice, or were chargeable with knowledge of its defective state, and added: "The chain might have been broken by an *act of violence*, which, for aught that appears, may have been committed only a short time before the plaintiff was injured." These decisions are sound in principle, and, as it seems, are decisive of the case in hand. It is strenuously urged that there should have been lights along the line of obstruction. But, as above suggested, this was quite unnecessary in case the barricade was sufficient of itself to warn travelers of danger. That this was sufficient for that purpose, if left as erected, the proof shows, and so the referee certifies. Cases are cited in which it is said, in general terms, that dangerous points in the highway should be barricaded *and lighted*; but such language was so employed to declare the rule that dangerous places in the public highway should be well and sufficiently guarded. If well and sufficiently guarded by barricade, lights were unnecessary; and then to omit them would not be negligence. As was said, in *State v. Bangor* (30 Me., 341-344), the defendant would be justified by showing the dangerous point properly fenced or lighted for protection against accident. Protection is all that is required, and if that be sufficient, it matters not what means are employed to that end. It is manifest, I think, that the plaintiff failed to establish a cause of action, and the motion for nonsuit should have been granted.

Judgment reversed, new trial granted, costs to abide the event, and reference discharged.

BOARDMAN, J., concurred.

LEARNED, P. J. (dissenting):

The referee finds that the defendants made the excavations and caused the obstructions, alleged to have occasioned the injury.

Their liability then did not arise simply from their duty as a municipal corporation to take care of the streets. It arose from their own act. Just as a private person might be liable for making an excavation and not guarding it properly.

This distinction is pointed out in *Griffin v. Mayor* (9 N. Y.,

456, at 461), where it is said that a municipal corporation, in the use and occupation of its property, is held to the skill and care which would be required of an individual. (See, also, *Mayor v. Furze*, 3 Hill, 612.)

Now, on the contrary, in the case of *Doherty v. Waltham* (4 Gray, 596), relied on by the defendants, there is nothing to show that the well had been opened by the defendants. The same is true of the cases of *State v. Bangor* (30 Maine, 341), and of *McGinity v. Mayor* (5 Duer, 674). In none of these does it appear that the obstruction or defect, which caused the injury, was created by the defendants.

The question then is, what is the duty of a person who makes an excavation, or places an obstruction, in a public highway, such as he may lawfully make or place, for temporary purposes of building and the like? "The performance of the work necessarily renders the street unsafe for night travel. \* \* \* The danger arises from the nature of the improvement, and if it can be averted only by special precautions, such as placing guards or lighting the street, the corporation which has authorized the work is plainly bound to take these precautions." (*Storrs v. Utica*, 17 N. Y., 104; *Davenport v. Ruckman*, 37 id., 568; *Grant v. Brooklyn*, 41 Barb., 381; *Creed v. Hartmann*, 29 N. Y., 591.)

But the defendants insist that having put up a barricade, they were not bound to see that it was maintained. Persons, however, travel at late, as well as at early hours. And the obligation of the defendants to warn travelers of the obstruction, which they have created themselves, continues at all times. In the case of *Johnson v. Friel* (50 N. Y., 679), the defendant, a contractor, had dug a ditch for the purpose of making a sewer. He filled the trench and repaved it. Afterwards the rain washed out a hole where the earth had been filled, and the plaintiff's horses were injured there. It was held that it was not enough that the defendant left the work in a proper and safe condition at the time. It was his duty to provide for, and anticipate, the natural effect of the rain; to see that during and after the rain it was in proper and safe condition, or that safeguards were placed or watchmen kept, or such measure of prudent forethought adopted to prevent damages to the traveling public.

If, then, a person making an excavation is bound to anticipate



that, two weeks afterwards, rain may settle the new earth, and to guard against that by safeguards or watchmen, is he not bound to see that a barricade put up in the evening is so securely fastened that no ordinary force will remove it before morning?

It seems to me that the obligation to protect the traveling public against the damages arising from such an obstruction or excavation is one which exists at all times, because the public are at all times entitled to use the road. Hence the person who has made the obstruction must maintain safeguards. Either he is bound to maintain them at his peril, or, at least, if he may leave them unprotected and exposed to the possibilities of removal during the night, he must erect them of such strength that no prudent and reasonable man would anticipate any danger that they would be taken away.

The case is not unlike that of an owner of premises who allows dangerous places to exist on them and who fails to notify persons coming thereon by invitation, express or implied. (*Coombs v. New Bed. Cord. Comp.*, 102 Mass., 592; *Indermaur v. Dames*, L. Rep., 2 C. P., 311.)

The question is, was the plaintiff actually warned by the defendants of the danger which they had caused? If not, then had they taken such measures for the purpose of giving the public warning, that their failure to notify the plaintiff of his danger could not have been reasonably anticipated?

The referee, as I understand, has substantially found against the defendants in this particular and I think his finding is not erroneous.

Judgment reversed and new trial granted; referee discharged; costs to abide event.

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ANNA ELIZA GOODYEAR AND SAMUEL S. BURNSIDE,  
EXECUTORS, ETC., RESPONDENTS, v. JOHN C. DE LA VERGNE  
AND NATHANIEL D. HALE, APPELLANTS.

*Admission contained in answer — acceptance of, by plaintiff*

Where, upon the trial of an action, a plaintiff desires to avail himself of an admission or averment contained in an answer, he must accept the admission or averment as an entirety; he cannot accept a portion of such admission or averment and reject the remainder.

APPEAL from a judgment in favor of the plaintiffs, entered upon a verdict directed by the court.

*E. Countryman*, for the appellant. A party relying on the admission of his adversary in a pleading must take the whole admission or statement as it stands, or nothing. He cannot avail himself of such part only as makes in his favor, and reject the residue. (*Stuart v. Kissam*, 2 Barb., 494; *Miller v. Avery*, 2 Barb. Ch., 583; *Craig v. Tappin*, 2 Sandf. Ch., 78; *Lewis v. Ryder*, 13 Abb., 1, 3; *Albro v. Figuera*, 60 N. Y., 630; *Rouse v. Whited*, 25 N. Y., 170, 175; *Dorlon v. Douglas*, 6 Barb., 451; *Nesbitt v. Stringer*, 2 Duer, 26.)

*S. S. Burnside*, for the respondents.

BOOKES, J.:

The learned judge on the trial held that the proof, supplemented by the admissions in the defendants' answer, established the plaintiffs' right of action, and directed a verdict for the latter for the amount claimed in the complaint.

It may be well first to see precisely how the parties stood on the pleadings. The complaint contained two counts: In the first, it was alleged that the plaintiffs caused their butter to be forwarded to the defendants at New York, to be sold on commission; that the defendants received and sold it, realizing therefor \$261, but refused to pay the plaintiffs therefor. The second count charged a simple sale and delivery of the butter by the plaintiffs to the defendants, and a refusal to pay.

The defendants, by their answer, admitted, (1) that they were partners; (2) that they received a quantity of butter from T. Sabin & Son, to be sold on commission, which butter they believed to be the same mentioned in the complaint; (3) that they sold the butter for T. Sabin & Son and paid them the net proceeds of the sale; (4) and that the money had been demanded of them, and that they had not paid it over save to said T. Sabin & Son; and they denied every allegation in the complaint, said admissions excepted. The answer, when analyzed, amounts to this: A full denial of the complaint, with an admission—or, more properly, an averment—that

they (the defendants) received the butter in suit from T. Sabin & Son for sale on commission; sold it for them and paid them the net avails. The plaintiffs were, therefore, put to full proof of their case, save as they should accept the admissions or averments in the answer in their aid. But if they accepted a part of such admissions or averments as proof they must accept them in their entirety. (*Albro v. Figueroa*, 60 N. Y., 630; *Rouse v. Whited*, 25 id., 170.) The proof was to the effect that the butter was the property of the plaintiffs, and was delivered at the railroad station directed to the defendants in New York, and that it was worth the amount claimed. The proof, standing alone, was insufficient to authorize a recovery. The proof failed to show that the butter was received or sold by the defendants. Now, if we bring in the admission or averments in the answer, that the defendants received and sold it, we must also accept the whole statement connected therewith, which would bring in also the alleged fact that the butter was received from T. Sabin & Son to be sold on commission; that it was sold for them and that they had been paid the avails. Connect these admissions or averments with the oral proof, and consider the case thus made, and it is apparent that the case was one for the jury on the facts. The evidence is that one of the plaintiffs had talked with one of the Sabins in regard to the latter's receiving the butter; then directed it to be carried to them, with the statement that they would know what to do with it. It was taken to them; they marked it to the defendants, and directed that it be taken and delivered at the railroad station, to be forwarded to the defendants, and it also appeared that they (Sabins) were commission merchants at Oneonta, the place where the butter was sent them by the plaintiffs. Now, supplement the admissions in their answer (of part of which the plaintiffs claim the benefit), to wit, that the defendants received the butter from T. Sabin & Son, sold it for them, and paid them the avails, and two serious questions of fact would arise: (1) Whether, on the proof and admissions considered together, there was not a sale of the butter by the plaintiffs to Sabin & Son; and (2) whether the plaintiffs did not make T. Sabin & Son their agents to forward the butter for sale to the defendants, in which case payment to them on sale would have been good payment on their part. Either of these questions found in favor of the defendants would

have defeated the action. Very manifestly, as I think, these questions were for the jury, as the case stood when the verdict was ordered for the plaintiff by the court. Accept nothing, as admitted by the answer, and the oral proof was insufficient to show that the defendants received or sold the butter. Accept the admissions or statements in the answer in their entirety, and consider them in connection with the oral proof, and the two questions of fact above suggested instantly arise.

The learned judge was in error, as I think, in directing a verdict for the plaintiffs as the case stood before him.

Judgment reversed, new trial ordered, costs to abide the event.

LEARNED, P. J., and BOARDMAN, J., concurred.

Judgment and order reversed and new trial granted, costs to abide event.

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WARREN B. MOREY, RESPONDENT, v. LEWIS W. MEDBURY  
AND ESTELLUS SMITH, APPELLANTS.

*Contract of sale — when title passes.*

Plaintiff and defendants having entered into an agreement for the sale of certain hops by the former to the latter, the same were, in pursuance of the direction of the defendants, delivered to the stationmaster at a designated railroad station, the defendants agreeing to pay for them there. At the time of the delivery the plaintiff instructed the agent to deliver them upon the receipt of the purchase-price thereof. After the hops had been at the station for a few days they were stolen. *Held*, that the title to the hops had passed to the defendants, and that they were liable to the plaintiff for the price thereof. (BOCKES, J., dissenting.)

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was brought to recover the price of certain hops, alleged to have been sold to the defendants by the plaintiff.

From the report of the referee it appeared that on or about the 20th day of September, 1873, at Georgetown, Madison county, N. Y., the plaintiff and defendants entered into an agreement by which the plaintiff sold to the defendants a quantity of hops and said defendants

agreed to take and pay for said hops at the rate of forty-five cents per pound; the hops to be thereafter delivered to the defendants by the plaintiff at such time and place and in such manner, that is, whether loose, in sacks, or pressed, as the said defendants might thereafter designate; that the sum of two dollars was paid and advanced to the plaintiff by the defendants upon said contract, and that at the time of such purchase and since then to the present time, the defendants were and have been copartners together in the purchase and sale of hops and other merchandise.

That afterwards, and before any directions had been received by the plaintiff from the defendants as to the said hops being delivered pressed or unpressed, the said hops so purchased by said defendants were pressed by the plaintiff into one bale; that the defendants on being advised of said fact made no objection thereto, and on being requested to designate the time when they would take said hops, requested said plaintiff to take said hops to the depot in Georgetown, on the Syracuse and Chenango Valley Railroad, and leave said hops in said depot, and also requested said plaintiff to leave with the station agent in charge of said depot, a statement showing the weight of said hops, and the price per pound agreed to be paid for said hops, so that said defendants could receive and pay for said hops at said depot, and not be obliged to go several miles from said depot to the residence of the plaintiff to pay for them. That, in pursuance of such instructions, suggestion or direction of the defendants, the said plaintiff soon thereafter, October 14, 1873, delivered said hops, so purchased as aforesaid, at the depot designated by said defendants, and in the manner directed by said defendants, and at the time of such delivery the plaintiff left with the station agent in charge of said depot a notice or order, of which the following is a copy:

“GEORGETOWN, Oct. 14, 1873.

“MR. BEACH—Sir: You will please let Sterling Smith have my bale of hops upon the receipt of the money at forty-five cents per pound. The weight of bale is 252 pounds, which, at forty-five cents, amounts to \$113.40. There was two dollars paid down, which my boys say Mr. Smith told them I might keep for extra trouble.

“W. B. MOREY.”

That the Mr. Beach referred to in said notice was the station agent in charge of, and had the care and management of said depot where said hops were directed to be delivered by the defendants, and were delivered by plaintiff, and that by "Sterling Smith" mentioned in said order or notice was intended and meant Estellus Smith, one of the defendants in this action.

That said notice or order so left with said Beach remained in the possession of said Beach during all the time said hops remained at said depot, and that said instructions or order to him had not since then been modified or changed by the plaintiff.

That afterwards, and on or about the 17th of November, 1873, the hops so delivered were in the night-time feloniously taken from said depot by some person or persons then and now unknown; that said hops have not since then been found.

That, in the month of January, 1874, the defendants personally notified said station agent who at the time was in charge of said depot and had been since October 14, 1873, that they were ready to receive said hops and demanded said hops of him.

*A. N. Sheldon*, for the appellants. Upon the facts found by the referee, the title to the hops at the time of the theft was in plaintiff and not in the defendants. (*Kein v. Tupper*, 52 N. Y., 550; *Murphy v. Hawthorn*, 4 Seld., 291; *Field v. Moors*, Hill & Denio, 418.) It was a cash sale; a case of payment on delivery, and the law implied a condition that the title should not pass until actual payment, and here the larceny was before payment. (1 Wait L. & P., 487; 8 Barb., 328.) The title would not pass on a delivery at the agreed place of delivery until actual payment. (42 Barb., 177; 13 Johns., 434; *Conway v. Bush*, 4 Barb., 564; see, also, 25 id., 474.) At the time of the larceny this bale of hops could have been attached as the property of the plaintiff. (10 Barb., 193.) Such contract remains executory until the price is paid on inspection and acceptance. (*Whitcomb v. Hungerford*, 42 Barb., 177.) The defendants had the right to weigh the hops at the depot, before payment, and, until weighed, the title did not pass. (Per *Jewett, J.*, in 4 Seld. R., 294; 2 Hill, 137.)

*L. B. Kern*, for the respondent. When the terms of sale are agreed on, and the bargain is struck, and every thing that the seller

has to do with the goods is complete, the contract of sale becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer. (*Hayden v. Demets*, 53 N. Y., 431; Kent's Com. [Comstock's ed., side paging], 492; 44 N. Y., 72; 5 Denio, 379; 22 N. Y., 368; 4 Hun, 565; 3 Keyes, 597.) The time of payment, in the absence of any agreement, was on the delivery of the hops. (16 N. Y., 451, 454.) The delivery vested the title to the hops in defendants; nothing remained to be done by plaintiff. (5 Denio, 382; 53 N. Y., 431; 15 Wend., 493, 497.)

LEARNED, P. J. :

By the contract of sale in this case, the title passed to the purchaser, subject, however, to the vendor's right of possession until payment. (2 Kent Com., 492; *Higgins v. Murray*, 11 S. C. N. Y. [4 Hun], 565, *Olyphant v. Baker*, 5 Den., 379 *Hayden v. Demets*, 53 N. Y., 431, *Terry v. Wheeler*, 25 N. Y., 520, at 525; *Burrows v. Whitaker*, 15 S. C. N. Y. [8 Hun], 260.)

The decisions of *Conway v. Bush* (4 Barb., 564); *Fleeman v. McKean* (25 id., 474); *Smith v. Lymes* (5 N. Y., 41) will be found to decide the right of the vendor to *possession*, as against the vendee, until payment; not the question of *title*, in case of loss.

Suppose, as suggested in the case of *Terry v. Wheeler*, the property had been such as might have increased — a flock of sheep — and an increase had taken place, whose would have been the increase? The owners of the flock, of course. And who would have been the owners? The purchasers.

The judgment should be affirmed, with costs.

BOARDMAN, J. :

I think this case was properly decided by the referee. The evidence authorized him to find that the property was delivered at the depot at the risk of the defendants, and to be paid for before being taken away. The contract was therefore fully performed by the plaintiff, and he was entitled to sue for and recover his pay. The defendants could not have resisted such claim. They were bound to pay, and the retention of the possession of the station agent for plaintiff, and

by his direction, until the price was paid, was in accordance with the contract. It was the possession, and not the title, which remained in plaintiff. Such possession was a security for the price. What more could the plaintiff have done in performance of his contract? What additional tender could he have made of the hops? In what respect was the plaintiff in fault, or for what failure on his part should he be denied the pay for his hops? The contract was valid and binding upon the defendants. Why may they refuse to pay in accordance with the terms of their contract, after the plaintiff has fully performed?

I concur with brother LEARNED in affirming the judgment, with costs.

BOOKES, J. (dissenting) :

There was no delivery of the hops at the time of the contract of sale. The contrary of this is not pretended, as it could not be maintained on the evidence submitted. The question then is, whether the delivery afterwards, at the railroad station, was such a delivery as vested the title to the property in the defendants. Very manifestly it was not. The plaintiff left the hops with the station agent as his own property, under written directions to deliver them on payment of the purchase-price. The direction to the station agent was to deliver "*my bale of hops upon the receipt of the money at forty-five cents per pound.*" A delivery of the property to the defendants by the station agent without payment would have been a wrongful delivery of the plaintiff's property; until payment the title remained in the latter. It is perfectly manifest that the plaintiff did not intend to part with his title until payment was made of the purchase-price. He expressly required payment as a condition of delivery. Until compliance with this condition the title remained in the vendor. These conclusions are fully sustained by the decision in *Conway v. Bush* (4 Barb., 564). See also *Fleeman v. McKean* (25 Barb., 474), and *Smith v. Lynes* (5 N. Y., 41). There are many other cases to the same effect. (See *Knight v. Mann*, 118 Mass., 146; 120 id., 220, and cases cited; and *Safford v. McDonough*, id., 290.)

The title to the hops, therefore, remained in the plaintiff at the time they were stolen from the railroad station, and it follows that



the loss occasioned by the larceny must fall on the party then having the legal title. (*Kein v. Tupper*, 52 N. Y., 550.) We are cited to several cases holding that, under a contract of sale of goods, where nothing remains to be done by the seller before making delivery, the right of property passes, although the price be not paid nor the thing delivered. (*Olyphant v. Baker*, 5 Denio, 379; *Hyde v. Lathrop*, 3 Keyes, 597; *Hayden v. Demets*, 53 N. Y., 426, 431.) But these decisions have no application to a case like this in hand, where payment was to accompany delivery. The judgment should be reversed and new trial granted, costs to abide the event, and reference discharged.

Judgment affirmed, with costs.

THE PEOPLE EX REL. HENRY L. HERMANCÉ AND WILLIAM W. HERMANCÉ, APPELLANTS, v. THE BOARD OF SUPERVISORS OF ULSTER COUNTY, RESPONDENTS.

*Chap. 695 of 1871 — in what cases County Court has power to act under.*

The provision of chapter 695 of 1871, authorizing the County Court, upon application of the party aggrieved, to make an order requiring the board of supervisors to refund to such person the amount collected from him, of any tax illegally or improperly assessed or levied, only applies to cases in which the assessors had no power to make the assessment, and not to cases in which they had power to act but erred in its exercise. (BOCKES, J., dissenting.)

*Matter of New York Protectors* (8 Hun, 91) and *Hudson City Savings Bank* (5 Hun, 612) followed; *Pell's Case* (MS., Commission of Appeals) distinguished

APPEAL from an order of the County Court of Ulster county, denying an application, under chapter 695 of 1871, for an order requiring the board of supervisors of Ulster county to refund a tax alleged to have been illegally assessed and collected.

A petition was presented to the court, upon due notice to the board of supervisors, alleging that the petitioners had been improperly and illegally assessed for \$10,000 personal property, which they

did not own or possess, and had been compelled to pay thereon a tax of \$600.40.

The facts were not contradicted, but the application was opposed by the attorney of the board, and the application was denied on the sole ground that the court had no jurisdiction, under the construction given to the statute by the Supreme Court.

*Schoonmaker & Linson*, for the appellants.

*F. L. Westbrook*, for the respondent.

LEARNED, P. J. :

A distinction has been laid down in the Court of Appeals between an erroneous and an illegal assessment. (*Bank of Chemung v. City of Elmira*, 53 N. Y., 53.) The former, where the assessors have the power to act, but err in its exercise ; the latter, where they have no power.

*In the Matter of New York Catholic Protectory* (15, S. C. N. Y. [8 Hun], 91), holds that, in the latter case, the statute under which the present application is made applies.

*In the Matter of Hudson City Savings Institution* (12 S. C. N. Y. [5 Hun], 612), holds that, in the former case, the statute does not apply.

The *Pells Case*, in the Commission of Appeals, was the case of assessment of United States bonds. It was, therefore, an illegal, not an erroneous assessment. And the decision in that case determines nothing as to the power of the county judge to review on the ground of *error*, an assessment made by the proper officers.

The affidavit of the applicants in this present case shows only that they were assessed for a greater amount than was just, or, rather, that they were assessed for personal property when they had none for which they were liable. This is substantially an over-valuation ; an error in judgment. It is not, as it was in the case of the *Bank of Chemung v. Elmira*, an assessment illegal, and for which the assessors had no jurisdiction.

To give the other construction to the statute (Laws 1871, chapter 695), which is urged by the applicants, would be to make the county judge a court of review of every alleged over-valuation of assessors.

This cannot be the reasonable construction of the statute, especially as it speaks only of "illegal and improper" taxes.

As the decision of this court, in the case above cited, is not reversed by the decision in the *Pells Case*, it should be followed.

The order should be affirmed, with ten dollars costs, etc.

BOOKER, J. (dissenting):

The decision in the *Pells Case* by the Commission of Appeals seems entirely conclusive of the case now before us. There the relator was taxed on an assessment for \$6,000, personal property, for each of the years 1866, 1867 and 1868; whereas, as was alleged, she should have been taxed on \$1,000 only for each of those years. Thus it was a case simply of over-valuation of the relator's personal property. It was a taxation on an assessment of \$6,000, instead of \$1,000, for three years. There, like the case in hand, the assessors had jurisdiction of the person and of the subject-matter. The relator was a resident of the town, and liable to taxation therein, and she was possessed, as was conceded, of \$1,000, personal property, liable to assessment. It was, therefore, a case of erroneous or over-taxation, neither more nor less. The Commission of Appeals held that the relator was entitled to relief under the laws of 1871, reversing the decision to the contrary, reported in 63 Barbour, 83. (*People ex rel. Pitts [Pells] v. Supervisors of Ulster*). Thus, this case holds that a party is entitled to relief under the laws of 1871, against an *erroneous* assessment. Indeed, it seems that this should be so, for in case of an *invalid* assessment the party has a perfect remedy without any aid from that act. The case in hand, in principle and on the facts, is precisely like the one decided in the Commission of Appeals.

It is true, the question discussed in the *Pells Case*, by the Supreme Court, was whether the law of 1871 was retrospective in its effect. This question was re-examined on appeal in the Commission of Appeals, and that court, after determining that the act was retroactive, went further and decided the case on the merits, holding that the relator, *on the facts there disclosed*, was entitled to the relief demanded. The case was fully considered on the question of the relator's right to relief. I see nothing *obiter* in that case.

The opinion of Commissioner REYNOLDS seems to cover the

entire ground of this case in its reasoning and conclusion, and necessarily so. Of course we are bound by this decision.

The order appealed from must be reversed, with \$10 costs and disbursements on appeal, and the case should be remitted to the County Court of Ulster county, to the end that such court may proceed in the matter and make the order authorized and required by the act of 1871.

Present — LEARNED, P. J., BOOKES and BOARDMAN, JJ.

Order affirmed, with ten dollars costs and printing.

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LEWIS HEAD, RESPONDENT, v. EDWARD H. TEETER, AS  
EXECUTOR, AND SARAH TEETER, AS EXECUTRIX, ETC., OF SLY  
TEETER, DECEASED, APPELLANTS.

*Evidence — Code, § 899.*

Although, under section 899 of the Code, a party to an action may testify as to a conversation between the deceased and a third person which he has overheard, so long as such testimony is limited to what was neither a personal transaction nor communication between the witness and the deceased, yet this rule does not prevail when the third person is an agent for, and is acting in the interest of the witness.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

On the 19th day of April, 1873, Lewis Head was the owner of 109 acres of land in the town of Danby, Tompkins county, and Francis Nourse owned a mortgage of \$1,180 covering the whole premises. On the 19th day of April, 1873, plaintiff sold to Sly Teeter fifty acres off from said 109 acres, and conveyed the same to him by warranty deed, which contained the following clause: "The party of the second part takes the above described premises subject to a mortgage of \$1,180, said mortgage given to George H. Fortner on the 21st day of February, 1867, by Lewis Head." This mortgage was the one owned by Francis Nourse and covered the 109 acres, of which the fifty acres sold to Sly Teeter

formed a portion. Before the deed of the said fifty acres was executed, it was agreed by and between the parties thereto that the consideration should be paid as follows: By the grantee giving his notes for \$400, by discharging a claim held by him against Thomas Head for \$170, and by paying the mortgage for \$1,180 on the 109 acres. This agreement was by parol and was not contained in the deed. Afterwards, and in or about the month of January, 1875, Sly Teeter died. On the 24th day of March, 1875, the whole premises were sold on said mortgage. The fifty acres deeded to Sly Teeter were, by a decree of the court, sold first and separate from the fifty-nine acres, and brought the sum of \$700. At the time of said sale, viz., March 24, 1875, there was due on said mortgage \$1,180 of principal, and interest thereon from April 1, 1873, being \$163.15, and making in all then due for principal and interest \$1,343.15.

The referee found that Sly Teeter's executors should pay the whole of the \$1,180, and interest from April 1, 1873, and gave judgment accordingly.

*S. D. Halliday*, for the appellants.

*Wm. N. Noble*, for the respondent.

LEARNED, P. J.:

It was substantially conceded on this appeal that the \$700 for which the fifty acres were sold on the foreclosure, should have been credited upon this claim, and the recovery should have been rendered accordingly.

But a very important question arises on the matter of evidence. Lewis Head, the plaintiff, sold and conveyed to Sly Teeter, the defendants' testator, fifty acres. The claim in this action is that, as a consideration therefor, Sly Teeter orally agreed with Lewis Head to pay a certain mortgage, which covered these fifty acres and fifty-nine acres more. This action is brought on that agreement. To prove the agreement Lewis Head was called as a witness in his own behalf. He testified (under objection and exception) that there was a conversation in his presence between his father, Thomas Head, and Sly Teeter, now deceased. That Thomas Head said:

“Mr. Teeter takes the fifty acres, and pays the mortgage of \$1,180 and interest after April first, until that time you are to pay the interest, and pays the balance by notes. That Thomas Head turned to Teeter and asked him if that was right, and he nodded his head, assenting; that the talk seemed to be addressed to the witness; that Teeter said yes, and nodded his head.”

This testimony is claimed to have been inadmissible under section 399 of the Code.

It has been decided that a party may testify to a conversation which he overheard between the deceased and a third person, so long as it is limited to what was neither a personal transaction or communication between the witness and the deceased. (*Cary v. White*, 59 N. Y., 336.) But, in the present case, Thomas Head was the agent of the plaintiff. In the matter of this conversation he was acting for the plaintiff.

He addressed the plaintiff, stated the alleged contract, and Teeter assented. This was a transaction between Teeter and the plaintiff. It was the same as if either Teeter or the plaintiff had stated the terms of the bargain, and the other party had assented. In the cases relied upon by the plaintiff the transaction has been between the deceased and some third person, while the party testifying has been a mere hearer of the conversation, and not a party to any transaction thereby shown.

But the present case is very similar to that of *Brague v. Lord et al.*, in the Court of Appeals (15 Alb. L. J., 66). The testimony was inadmissible. There must, therefore, be a new trial. I have not thought it necessary to consider the question whether, as the plaintiff has sold the remaining fifty-nine acres, he can recover at all. No opinion is intimated on that question. Judgment reversed; new trial ordered; reference discharged; costs to abide the event.

Present — LEARNED, P. J., BOOKES and BOARDMAN, JJ.

Judgment reversed; new trial granted; referee discharged, and costs to abide event.

## THE PEOPLE EX REL. MATTHEW VAN KEUREN, RESPONDENT, v. THE BOARD OF TOWN AUDITORS OF THE TOWN OF ESOPUS, APPELLANTS.

*Commissioner of highways — not agent of town.*

The relator, an overseer of highways, under the directions of the commissioner of highways of the town of Esopus, removed obstructions from what was claimed to be a highway. Subsequently, one Cole brought a suit against him for trespass, on the ground that the road was not a public highway but belonged to said Cole, and recovered a judgment for twenty-five dollars. From this judgment relator appealed to the General Term and Court of Appeals, where the judgment was affirmed. No notice of the action or the appeals was given to the town.

Subsequently, this application was made for a *mandamus* to compel the town to pay the relator \$2,711.47, for the amount of the judgment, and the costs and expenses of the action. *Held*, that he was not entitled to a *mandamus*, (1) because he had failed to give notice to the town of the action or the appeals, and thereby prevented it from taking charge thereof; and (2) because the commissioner of highways was not the agent of the town, and it was not liable for his acts.

APPEAL from an order made at Special Term granting a writ of peremptory *mandamus*, directing the defendant to audit and allow the bill of the relator.

*Lounsbery & Childs*, for the appellants.

*S. L. Stebbins* and *A. Schoonmaker, Jr.*, for the respondent.

LEARNED, P. J. :

It is not necessary, in the view I take, to examine how far the acts of the commissioner of highways bound the town in respect to the matters out of which the present claim arose. Assume for the present, that he was the agent of the town, and that they would be liable, as his principal, for what he did.

The facts, then, are briefly that the commissioner of highways issued his road warrant to Van Keuren, overseer of highways, for the working of a certain road district in the town. He also orally directed him to do certain work of cutting boughs from apple trees and removing a stone. These acts Van Keuren did. It proved, however, that in doing these acts, Van Keuren was guilty of a tree-

pass on the property of Martin Cole, for the reason that the place where this work was done was not a public highway. Cole sued Van Keuren for the trespass in a Justice's Court. The defendant set up, among other things, title; the action was discontinued, and a new action was commenced in this court. The defendant set up a denial, title in himself, a right of way, and his authority as overseer to remove obstructions from the highway. On the first trial the jury disagreed.

On the second they rendered a verdict for twenty-five dollars damages. Judgment was affirmed at the General Term and in the Court of Appeals. Van Keuren now presents a bill to the town auditors of \$2,711.47. This is for the judgments, damages and costs, for his expenses in obtaining witnesses, for expenses and services of his attorneys and counsel and other expenses.

Now, it will be seen that a very small part of this bill, only twenty-five dollars, is the compensation recovered against Van Keuren for the wrongful act, which it is said that he was ordered to do by the agent of the town. All the rest of his large expense has been occasioned by his defending, and his persisting in defending, the action brought against him for the trespass. I do not see that he was under any obligation to defend that action.

If, in committing the trespass, he was the agent of the town, and if the town was under an implied obligation to indemnify him, then he should have given the town the option either of defending the action or of leaving it undefended. The town, if it had had the opportunity, might have decided as the jury did, that the place where the acts were done was not a public highway. And the town might, therefore, in the Justice's Court, have interposed no defense of title, but might have questioned the amount of damages only. But Van Keuren, so far as appears, gave the town no such opportunity. He did not, so far as appears, notify the commissioner of highways, or any town officer, of this litigation in which he had become involved, nor did he offer to allow the commissioner or the town to defend on his behalf.

In the case of *Howe v. Buffalo and Erie Railroad* (37 N. Y., 297), relied upon by the learned justice who granted the peremptory mandamus, the conductor of the defendants, when sued for an act claimed to be done by their authority, immediately notified them,



and they employed the attorney and counsel who defended it. They were held liable to the conductor to indemnify him against the recovery.

If Van Keuren had claimed that, as the agent of the town, he was entitled to be indemnified by them, it could only be for the acts which the town directed him to do. It never directed him to defend this suit, or to appeal it, and to accumulate this large bill of expense. Even in respect to the damages recovered, the town ought to have had an opportunity to be heard as to their amount. While, in respect to the costs and expenses, the town has not in any way authorized them. And certainly to one who has read the evidence taken on the trial and now again presented, it might seem doubtful whether the town officers would ever have permitted this litigation if they had been allowed to control it. There are circumstances to which it is not necessary to refer, shown in the evidence, which give the controversy the appearance of a personal matter between Van Keuren and Cole, where the forms of law were really used for Van Keuren's benefit.

But, however that may be, it is enough that the town did not carry on the litigation, and was not allowed to control, or stop, or discontinue it. The town, therefore, should not be made to pay.

The relator cites the case of *Coventry v. Barton* (17 Johns., 142). The plaintiff in that case, working under the direction of the overseer of highways, had removed an alleged obstruction, upon an agreement by the defendants to indemnify him for the act. The plaintiff had been sued and judgment had been recovered against him. The defendant had been present at the trial. He was held liable to the plaintiff on his promise of indemnity. The extent of his liability was not decided. The relator also cites *Powell v. Newburgh* (19 Johns., 284). In that case the plaintiff had been sued for an official act. He had succeeded in the action, and his act had therefore been decided to be lawful. It was held that he was an agent of the defendant, and was entitled to recover the expenses of the successful litigation. The recovery was allowed on the ground of such agency, and of the expenditure by the plaintiff of money in the business of such agency. And it appeared that the defendants had notice of the suit against the plaintiff.

That case cannot in any respect be analogous to the present, unless

it be shown that a commissioner of highways is the agent of the town. That he is not, is well settled, I think, by several decisions. (*Lorillard v. Town of Monroe*, 11 N. Y., 392; *Morey v. Town of Newfane*, 8 Barb., 645; *Galen v. Clyde & Rose R. R. Co.*, 27 id., 543, at 551; *Fishkill v. Fishkill & Beekman R. R. Co.*, 22 id., 634; *Mather v. Cranford*, 36 id., 564; and the same is implied in *Hover v. Barkhoof*, 44 N. Y., 113.)

In the case of *Lamont v. Smith*, commissioner (not reported), it was held in the third department, that, in an action against a commissioner of highways for negligence in not keeping a bridge in order, the successor in office could not be substituted. Thus it was held that the liability, if any, was personal, and not against the town. There are, then, these two reasons why the relator should not compel the town to pay these expenses. The one is, that he carried on this litigation without giving notice to the town, and without permitting them to control it. The other is, that the commissioner of highways, by whose direction he acted, is not an agent of the town, and therefore the town is not responsible for his acts.

The order should be reversed, with ten dollars costs and printing.

Present — LEARNED, P. J., BOOKES and BOARDMAN, JJ.

Order reversed with ten dollars costs and printing, and motion for *mandamus* denied, with ten dollars costs.

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EDWARD VAN SLYCK AND EDWARD W. FOOTE, RESPONDENTS, v. FRANCIS B. NEWTON, APPELLANT.

*Mortgage for existing debt — mortgagee not bona fide purchaser — Judgment recovered against one as assignee — when binding on him individually — how far binding on his co-mortgagee.*

Where a chattel mortgage is given to secure an existing indebtedness, the mortgagee is not entitled to the rights of a *bona fide* purchaser for a valuable consideration, as against one from whom the mortgagor has obtained the property by fraud.

On January 4, 1876, Foote and Van Slyck were in possession of certain personal property, claiming to be entitled thereto by virtue of a chattel mortgage given by one Stearns to secure them for indorsements. On the twenty-seventh of January, Stearns made a general assignment to Van Slyck, who accepted the

same. On the twenty-eighth of January, an action of replevin was commenced by one Barnard against Stearns and Van Slyck, as assignee, to recover the property, on the ground that Stearns had obtained the same from him by fraud. The property was seized by the sheriff, and a judgment having been recovered by Barnard, the same was delivered to him. In this action, brought by Foote and Van Slyck against the sheriff, *held*, (1) that the plaintiffs were not *bona fide* purchasers for a valuable consideration; (2) that as against Van Slyck the judgment recovered in the first action was conclusive, and as against Foote, competent evidence to prove that the property belonged to Barnard at the time of the seizure.

**APPEAL** from a judgment in favor of the plaintiffs entered upon the verdict of a jury, and from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

One Stearns, being in possession of a stock of goods in a store, mortgaged them, December 18, 1875, to Campbell, who took immediate possession. On the twentieth of December, he executed another mortgage to the plaintiffs on the same property, to secure them as indorsers, and Campbell agreed to remain in possession as their agent. On the fourth of January following, possession of the property was surrendered to the plaintiffs by Stearns. This, however, seems, in some way, to have been subject to Campbell's claim. For one of the plaintiffs testified that Campbell's claim was paid up finally, February twelfth. On the 27th of January, 1876, Stearns made a general assignment to Van Slyck, one of the plaintiffs, for the benefit of creditors, which assignment Van Slyck accepted.

On the 28th of January, 1876, Charles E. Barnard and others commenced an action of claim and delivery against Stearns and Van Slyck, as assignee. In this, the plaintiffs claimed that certain goods were obtained from them by Stearns, fraudulently, when he was insolvent. In that action Newton, the present defendant, a deputy sheriff, took the goods in question on the twenty-eighth day of January, under the usual direction of the plaintiffs' attorney. The defendants in that action, both Stearns and Van Slyck, appeared and answered and then withdrew the answer they had put in, and judgment was perfected for the plaintiffs, Barnards, therein against the defendants.

Van Slyck and Foote, the present plaintiffs, now sue the deputy sheriff, Newton, for the taking of those goods, claiming them under

their mortgage, and averring that the title and possession was in them by virtue of said mortgage. The court held that there was no question for the jury but the value of the property, and that the plaintiffs were entitled to recover.

*John W. Boyle*, for the appellant.

*A. N. Sheldon*, for the respondents.

LEARNED, P. J.:

Upon the pleadings the title and possession of the plaintiffs to the property are in issue. If, as against the plaintiffs, the Barnards had title, and if the defendant took the property by their authority, he is entitled to succeed in the action.

The plaintiffs' mortgage was given to secure a prior liability. It has been decided that such mortgagees are not *bona fide* purchasers for a valuable consideration, as against one from whom their mortgagor obtained the property by fraud. (*Woodburn v. Chamberlin*, 17 Barb., 446.) In the case of *Malcom v. Loveridge* (13 Barb., 372), and similar cases cited by the plaintiffs, the mortgagee parted with value on the credit of the property. If it be proved then, in this action, that Stearns obtained the property by fraud from the Barnards, so that they could have recovered it from Stearns, and if Newton took it as their agent, then the plaintiffs could not recover against Newton, any more than Stearns could have recovered against him.

But, perhaps, it is not necessary to rely upon that principle to dispose of this case. The question seems to be as to the effect of the judgment recovered in the case of the Barnards against Stearns and Van Slyck, as evidence on the present trial of the title of the Barnards. The complaint, in that action, averred the ownership of the property by the plaintiffs therein, and the possession and wrongful detention by the defendants. The judgment, after proof taken, was that the plaintiffs were the owners of the property, and entitled to retain it and to recover damages for the detention and costs. The right of the plaintiffs, thus adjudicated, must have referred to January 28, 1876. Van Slyck was a party to that action, and is bound by the result. As against him, it is adjudicated that on the 28th of January, 1876, the Barnards owned this property and that he was

wrongfully detaining it. If the rights which he now seeks to set up in this action were valid, as against the Barnards, they would have afforded a successful defense to that action. For if he, either alone or jointly with another, owned or was entitled to the possession of the property, that fact would, if shown, have defeated the Barnard action. That he was described in the title of the complaint as assignee, did not prevent him from showing any fact which would entitle him to possession, or would prove ownership in him. Van Slyck, therefore, cannot recover against Newton for taking, as the Barnards' agent, property which, as between him and them, has been adjudged to be theirs.

The alleged title and ownership of Van Slyck and Foote were joint. They were co-mortgagees, and they aver that as such they were in possession at the time of the alleged taking. The possession which Van Slyck had was, as these plaintiffs aver, their possession.

Whether or not the Barnard judgment was conclusive against Foote, it was evidence against him (Greenlf. Ev., § 174, *et seq.*), and the evidence was not contradicted; that is, there was nothing shown to contradict the title of the Barnards.

When Van Slyck was sued by the Barnards, if he was not solely in possession, and if he and Foote were in possession jointly, I do not see why Van Slyck might not have averred a defect of parties defendant in his answer. (*Wooster v. Chamberlain*, 28 Barb., 602.) Thus Foote might have been brought in as defendant.

The judgment should be reversed and a new trial ordered, costs to abide the event.

Present — LEARNED, P. J., BOOKES and BOARDMAN, JJ.

Judgment and order reversed, new trial granted, costs to abide event.

EMIL KOENIG, PLAINTIFF, v. THE GLOBE MUTUAL LIFE  
INSURANCE COMPANY, DEFENDANT.*Insanity — Evidence of experts — what questions may be asked.*

In this action, brought upon a policy of life insurance, the principal question was whether or not the assured was sane at the time of her death. Upon the trial, her family physician was asked, and against the defendant's objection and exception, allowed to answer the following questions: "From your experience and reading, and from your acquaintance with the mental condition of the deceased, what effect, if any, would you say this disease (melancholia) would have upon her as to her power to control her actions or to resist any impulse with which she might be seized?" "In this case how do you think it was?" *Held*, that the questions were properly admitted.

(*Van Zandt v. Mutual Benefit Life Insurance Company* (55 N. Y., 169) distinguished.)

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a verdict in favor of the plaintiff.

This action was brought upon a policy of insurance, issued for the benefit of the plaintiff upon the life of his wife, by the Merchants' Life Insurance Company of New York, the liability of that company having been subsequently assumed by the defendant.

The policy contained a clause avoiding it, in case the insured died "by her own hand." The wife was found in the garret of her house hanging dead. The plaintiff claimed that she was insane at the time.

*S. W. Rosendale*, for the plaintiff.

*George W. Miller*, for the defendant.

LEARNED, P. J.:

The only point argued in this case is, whether the following questions were admissible:

Q. From your experience and reading, and from your acquaintance with the mental condition of the deceased, what effect, if any, would you say this disease would have upon her as to her power to control her actions, or to resist any impulse with which she might be seized? A. I think that the impulses and the will, in the

majority of cases, become uncontrollable, and is not under their control. They are led away by impulses. They will attempt any method to take their life.

Q. In this case how do you think it was? A. I think her impulse was uncontrollable; entirely so."

The objection taken to these questions were that they were incompetent; that it was a question for the jury.

The appellant relies on the case of *Van Zandt v. Mutual Benefit Life Insurance Company* (55 N. Y., 169). In that case the following question was put:

"Assuming that a person had that form of insanity which you denominate melancholia, and had committed suicide, you would attribute that suicide to the disease? A. Yes, I should attribute it as the result of insanity."

Of this question the court said that it called not for any fact or information peculiarly within the knowledge of an expert \* \* but for the inference of the witness from a supposed fact, which inference the jury were capable of drawing, and which it was their province to draw.

It seems to me that the questions in the present case are different. In the first place they are not based on any "supposed fact," but on the actual knowledge of the witness, who was the family physician of the deceased. Next, these questions did call for a fact peculiarly within the knowledge of an expert; that is, the effect of a certain disease on the power of controlling actions and resisting impulses. The inquiries were as to the effect of the disease on the power of the will. This was a matter of physical science. From the mere fact that the deceased was suffering under a certain disease, the jury could not know or infer that such disease had any effect whatever on the power to control actions. Certainly many severe diseases do not affect that power. It was, therefore, proper to prove what the effect of this disease was in that respect.

The objectionable question in *Van Zandt v. Mutual Benefit* (*ut supra*) did not ask for the fact of the usual effect of disease on the will, or for its effect on the will of the deceased. It asked merely for an inference; an inference whether the suicide was caused by insanity; in substance, what the witness would have decided if he had been a jurymen.

The answer to that question involved a consideration not merely of the mental condition of the deceased, but of all the circumstances of the act of suicide. From those circumstances the jury might judge that the act was one of deliberation, unaffected by any impairment of mental power, or that it was an act of impulse.

In the present case the jury were left to decide on that question from all the facts, including the circumstances as well as the mental condition. It is possible that the latter part of the answer to the first question was improper. It was not strictly responsive. But no motion was made to strike this out. We must judge of the propriety of the question by the questions themselves, not by the answers.

Judgment should be given for the plaintiff on the verdict, and a new trial denied, with costs.

Present — LEARNED, P. J., BOOKES and BOARDMAN, JJ.

Order affirmed with costs, and judgment ordered on verdict.

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ELIJAH M. HEWITT, PLAINTIFF, v. WILLARD D. WARREN,  
DEFENDANT.

*Fraudulent representation—liability of infant for — the action must be purely for tort.*

This action was brought to recover damages for false and fraudulent representations made by the defendant upon the sale of a horse. The complaint alleged that the false and fraudulent representations were made in a warranty contained in the contract of sale, with intent to deceive and defraud the plaintiff. The defense was infancy. *Held*, that as the plaintiff had not disaffirmed the contract, or returned or offered to return the horse, that he was not entitled to recover.

The proper remedy in such a case would be to return or to offer to return the horse, and thus put the infant in the position of a mere wrong-doer, unjustly keeping what he had fraudulently obtained.

Where the substantive ground of the action is contract, as well as where the contract is stated as inducement to an alleged tort, infancy is a defense.

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a verdict in favor of the plaintiff.



The action was brought to recover damages for the breach of a warranty upon the sale of a horse, the warranty being alleged to have been false and fraudulent. The complaint stated, among other things: "And plaintiff further alleges that before he so purchased said mare, and during the negotiations for such sale and purchase, said defendant falsely and fraudulently, and with the intention to cheat, deceive and defraud this plaintiff, warranted and represented to said plaintiff that said mare was all right, in every way, both in single and double; whereas, in truth and in fact, said mare was vicious, ugly and balky, and was worth \$150 less by reason thereof; and plaintiff further says that the aforesaid representations so made by defendant were wholly false and untrue, and were well known so to be by defendant at the time of making the same.

"And plaintiff further says that he purchased said mare relying upon said representations and believing them to be true; that by reason of said false and fraudulent representations this plaintiff became and was and is damaged in the sum of \$150."

The defense was infancy and a denial of the allegations of the complaint except as to the fact of sale.

*M. J. Sunderlin*, for the plaintiff. The action is not to enforce a fraudulent warranty or contract of warranty. The contract has been fully performed, and this action is to recover damages resulting from the false and fraudulent representations made by the defendant to induce the plaintiff to make the contract. The defendant being an infant is liable for his tortious and fraudulent acts as much as though he were an adult. (*Conklin v. Thompson*, 29 Barb., 218; *Robbins v. Mount*, 33 How., 24; *Eckstein v. Frank*, 1 Daly, 334; *Wallace & Christopher v. Mores*, 5 Hill, 391; *Bullock v. Babcock*, 3 Wend., 391; *Campbell v. Stakes*, 2 id., 137; *Studwell v. Shafter*, 54 N. Y., 249.)

*John J. Van Allen*, for the defendant. The defendant being an infant, and this being an action on contract for the sale of a horse, the plaintiff cannot recover, the contract not being binding upon him. Although the complaint alleges that the defendant warranted the mare to be all right, that said warranty was false, and was

known to be so by the defendant; yet the action is upon contract. The *gravamen* of the action is the contract, which cannot be made binding upon the infant by alleging deceit. (Tyler on Infancy and Coverture, §§ 123, 124; *Green v. Greenback*, 2 Marsh., 485; 4 Eng. Com. Law R., 375; *Moore v. Eastman*, 1 Hun, 578; *Jennings v. Rundall*, 8 T. R., 335; *Liverpool, etc., Ass. v. Fairhurst*, 9 Exch., 422; *Wright v. Leonard*, 11 C. B. [N. S.], 258; *Burnhard v. Haggis*, 14 id., 54; *Prescott v. Dudley*, 32 N. H., 101; 2 Kent's Com., 241, and note; *Morrill v. Aden*, 19 Verm. R., 505; *Johnson v. Pie*, 1 Lev., 169; *Vasse v. Smith*, 6 Cranch, 226; *West v. Moore*, 14 Verm. R., 447; *Wilt v. Welsh*, 6 Watts' R., 1; *Brown v. Dunham*, 1 Root's R., 273; *Brown v. McCune*, 5 Sandf., 224; *Studwell v. Shafter*, 54 N. Y., 249; *Greene v. Green*, 7 Hun, 492; *People v. Kendall*, 25 Wend., 399; *Campbell v. Stakes*, 2 id., 137; *Campbell v. Perkins*, 4 Seld. R., 440, 441; *Burley v. Russell*, 10 N. H., 484; *Merriam v. Cunningham*, 11 Cush., 40; *Bartlett v. Wells*, 1 B. & S. B. R., 836; E. C. L. R., 101; *De Roos v. Foster*, 12 C. B. [N. S.], 272; E. C. L. R., 104; *Manley v. Scott*, 1 Sid. R., 129; *Penrose v. Curren*, 3 Rawl. R., 351.)

LEARNED, P. J.:

This action is brought to recover damages for false and fraudulent representations made on the sale of a mare. The defense is, first, a denial of the false representations, and, secondly, the infancy of the defendant.

The complaint uses the language "warranted and represented," but it distinctly charges falsehood and fraud, and intention to defraud, in this warranty and representation. It is, then, an action to recover damages for the alleged fraud perpetrated to induce the plaintiff to enter into a contract.

There is no doubt that an infant is liable for his torts not connected with contracts, and that he is not liable for mere contracts unconnected with torts. But there is a class of cases where some tortious act enters into, or is connected with, the making of the contract. In respect to these, the line of decisions is not at the first glance apparently uniform.

Of these cases the following are cited by the plaintiff to sustain his view:

*Robbins v. Mount* (33 How., 24). In that case the defendants were not held liable, and nothing was decided as to infants. The injury was alleged to have arisen from some negligence or carelessness in a building, by which water ran upon rooms occupied by the plaintiff.

In *Eckstein v. Frank* (1 Daly, 334), it was held that where an infant obtains property upon representations that he was of full age, he is liable, in an action of tort, brought either to recover the property back or to recover damages.

In *Wallace v. Mores* (5 Hill, 391), an infant was held liable for obtaining goods fraudulently with intent not to pay.

*Campbell v. Stakes* (2 Wend., 137), was an action for misusing a horse hired by the defendant, an infant.

*Stuchwell v. Shapter* (54 N. Y., 249), held that in an action for the price of goods sold and delivered to an infant he could not be made liable by reason of fraudulent representations as to his credit.

*Bullock v. Babcock* (3 Wend., 391) and *Conklin v. Thompson* (29 Barb., 218) are cases of actual tort not connected with contract.

It will be seen that in none of these cases was the infant held liable where the tort was connected with a contract, unless the contract was disaffirmed by the plaintiff. In *Eckstein v. Frank* the ground of recovery was said to be that the defendant had obtained the property wrongfully. The plaintiff disaffirmed by suing, either for the property or for damages, and by not suing on the contract. In *Wallace v. Mores* the plaintiff disaffirmed, treating the transaction as a tort; not as a contract. In *Stuchwell v. Shapter* the court reversed the judgment for the plaintiff, saying that the action was founded on contract, and not based on fraud in disaffirmance of it.

This present action is not brought in disaffirmance of the contract. If the contract should be disaffirmed the plaintiff would have no title to the mare. But he kept the mare and thus affirms the contract, and asks damages for the fraud connected therewith.

In *Moore v. Eastman* (8 N. Y. S. C. [1 Hun], 578), an infant had hired a horse. The horse was taken sick, and the infant, against the advice of the doctor and the hotel-keeper, drove the horse. From the effects of such driving the horse died. The court held that, if the acts of the infant had been malicious or willful he would have been liable; if they were only unskillful, he would not. That there

must be a tort independent of the contract. Although that case is not quite analogous to the present, yet the principle is similar, and the authorities there cited and approved apply directly. Prominent among these is *Green v. Greenbank* (2 Marshall, 485 ; S. C., 4 Eng. C. L. R., 375), where it was held that an infant was not liable for an action for falsely and fraudulently deceiving the plaintiff in an exchange of horses, because the deceit was practiced in the course of the contract. This same view is recognized in *People v. Kendall* (25 Wend., 399), and in *Munger v. Hess* (28 Barb., 75).

The general rule is laid down in Kent : "The fraudulent act to charge him must be wholly tortious ; and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover or case by a change of the form of the action." (2 Kent, 241.)

So it is held that infancy is a good defense to an action on the case for deceit and false warranty in the sale of goods. The false representations are a part of the contract. (*Prescott v. Norris*, 32 New Hamp., 101.)

Again, infancy is a good bar to an action founded on a false and fraudulent warranty upon the sale of a horse, whether such action be in form *ex contractu* or *ex delicto*. (*West v. Moore*, 14 Vt., 447, *Morrill v. Aden*, 19 Vt., 505.)

To the same effect is *Wilt v. Welsh* (6 Watts, 1), which contains a full examination of the cases, and holds that where the substantive ground of the action is contract, as well as where the contract is stated as inducement to alleged tort, infancy is a defense. So, too, *Studwell v. Shapter* (*ut supra*).

This, too, is the doctrine stated in Tyler on Infancy. (§ 124, p. 128.) And this view makes all the cases consistent with each other. Thus, if an infant, by fraud, obtains property, with no intention of paying, though it be under the pretense of a contract of purchase, the defrauded party may recover. He does so on the ground that there was no real contract, and he disaffirms the apparent contract. On the same ground those cases must stand which have permitted a recovery for damages when an infant, to obtain goods, has fraudulently pretended that he was of full age.

On the same principle, if a party has been induced to purchase property from an infant, by the infant's fraud and misrepresentation,

it would seem that he might, on discovering the fraud, disaffirm the contract, return, or offer to return the property, and thus put the infant in the position of a mere wrong-doer, unjustly keeping what he had fraudulently obtained. And it would seem that the infant would then be liable in damages for tort.

But where, as in the present case, the aggrieved party retains the benefit of the contract, he does not disaffirm it. His action there rests on the ground that he has made a contract, and it is necessary for his recovery that he should show that a binding contract has been made. Here, then, infancy becomes a defense. The defendant says there has been no binding contract; no action, therefore, lies for fraud in respect to a contract which he could not make. The alleged contract is the substantive ground of, or the inducement to, the cause of action; for, if there was no contract, then there could be no fraud in the making of it, and disproving the contract defeats the action. Therefore, as decided in all the cases above cited, infancy is a bar.

From these views it follows that the verdict must be set aside and a new trial granted, costs to abide the event.

And further, that the order denying the motion to vacate the order of arrest must be reversed, with ten dollars costs and printing, and such order of arrest vacated, with ten dollars costs.

Present — LEARNED, P. J., BOOKES and BOARDMAN, JJ.

New trial granted; costs to abide event; order denying motion to vacate order of arrest reversed, with ten dollars cost and printing; and order of arrest vacated, with ten dollars costs.

# MEMORANDA

OF

## CASES NOT REPORTED IN FULL.

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GILBERT MURDOCK, APPELLANT, v. CHESTER ADAMS  
AND FREDERICK PHILIPPS, RESPONDENTS.

*Readjustment of costs — when granted — what direction as to readjustment proper.*

APPEAL from an order of the County Court of Otsego county, directing that the items of costs appearing in a bill of costs, "taxed by the clerk of Otsego county, in this action, and the whole of such bill be stricken out and such taxation be set aside, and the clerk of Otsego county adjust the same on the usual notice, at such sum as the interest on the verdict herein will amount to on the day such adjustment will take place.

The facts upon which the motion for a readjustment of costs was based appear sufficiently from the following affidavit :

"Walter H. Bunn, being duly sworn, deposes and says, that he is the county clerk of Otsego county; that on the 14th day of July, 1874, he adjusted the costs in above entitled action in favor of plaintiff at sixty-seven dollars and sixty-eight cents; that said costs were noticed for readjustment on the 22d day of July, 1874, at 9 h. A. M.; that on July 22, 1874, at 9 h. A. M., Geo. S. Gorham, Esq., plaintiff's attorney, presented said bill of costs for readjustment; that deponent asked said Gorham if there was any objection by defendants' attorneys to the bill; said Gorham answered 'that he did not understand any item of the bill to be objected to.' He also stated that he had met Mr. Lynes, defendants' attorney, on the street, and he had said nothing to him about the taxation. Whereupon deponent marked or indorsed said costs as 'readjusted at sixty-seven dollars and sixty-eight cents,' and said Gorham left the office. And deponent further says, that at nine o'clock and five minutes A. M., James A. Lynes, Esq., one of the defendants' attorneys, appeared and asked to be

heard upon readjustment of said costs, stating his objections to the bill, and also stating as a fact that plaintiff's attorney well knew that he intended to oppose the retaxation. Deponent thereupon sent John Kelly, Esq., deputy sheriff of said county, to the hotel where plaintiff's attorney was stopping, with instructions to notify said Gorham that Mr. Lynes was in attendance at the clerk's office, and desired to be heard upon the retaxation of the costs in aforesaid case, and that I proposed to open the taxation and hear the argument thereon. Such notice was personally given to plaintiff's attorney by said Kelly, as deponent is informed and believes true. Defendants' attorney did not appear; whereupon I did set aside the retaxation previously made as aforesaid. The defendants' attorney objected to the allowance of costs to plaintiff, on the ground that the action was brought against the defendants' official acts as trustees of a school district, and produced the certificate of H. G. Prindle, county judge, presiding at the trial of said cause, which certificate is hereto attached. Defendants' attorney also cited *Clarke v. Tunnickliff* (38 N. Y., 58), Laws of 1847 (chap. 480) and other authorities. After hearing such argument I did strike out and disallowed all the items of aforesaid bill of costs, except the item 'interest on verdict, eleven dollars and eighty-five cents,' at which amount, to wit, eleven dollars and eighty-five cents, the said bill was by me readjusted.

"WALTER H. BUNN.

"Sworn to before me, this 16th day }  
of July, 1875."

The plaintiff's attorney disregarded the last action of the clerk and issued execution for the recovery and costs as first taxed.

The court at General Term said: "The motion to set aside the readjustment of the costs, procured by the plaintiff's attorney on the twenty-second of July, at nine o'clock, *sharp*, was very properly granted. Such readjustment was hastily made by the clerk, in the absence of the defendants' attorney, and he was right in doing all in his power to give the latter an opportunity to be heard. His efforts to get the plaintiff's attorney again before him were, however, unavailing, and his subsequent *ex parte* readjustment was not recognized by the plaintiff's attorney, and, of course, stood for naught. The defendants' attorney, therefore, has had no hearing before the

clerk on the taxation, nor has he had an opportunity to be heard on that proceeding, according to fair practice.

Under the circumstances of this case, he should not be held in default on the readjustment. The motion was for nine A. M. The plaintiff's attorney was promptly on hand at the clerk's office, and although he had been informed that the defendants' attorney intended to appear and oppose the taxation, he gave the clerk to understand that there would be no opposition, and induced that officer hastily and without waiting even five minutes after the time specified in the notice, to make and certify the readjustment. The attorney then immediately left the clerk's office by the back door, and although called upon within a very few minutes to return and attend before the clerk, he refused to do so. His great haste in procuring the readjustment, and refusal to return when requested, stand without any reasonable excuse. The advantage gained by this questionable course of procedure, he cannot be allowed to hold. The County Court was right, therefore, in setting aside the readjustment, and in giving the defendants' attorney an opportunity to be heard. To this extent the order of the County Court was manifestly right.

But that court went further, and directed the clerk as to his action on the readjustment. This would be very well in a case where the parties have been before the clerk together, and presented before that officer such facts as they wish to submit. But here the parties have not been heard together before that officer. What will be the state of the case when they meet on the readjustment, we cannot now know. Perhaps the defendants' attorney will not present his certificate from the county judge, now before us in the papers; and again, he may present that, strengthened by an additional certificate covering the points of objection now urged against its sufficiency. On the other hand, perhaps the plaintiff's attorney may obtain a certificate from the county judge nullifying the one already given; or perhaps he may show an appeal to the superintendent, and a decision thereon, and thus put the case without the statute and decisions relied on by the defendants' attorney. We cannot now determine what will be the case made before the clerk on the readjustment, and therefore cannot direct his action in advance.

On the case made by the parties before the clerk, he will first



determine the questions raised. After which the dissatisfied party can have a hearing before the court, if a hearing then shall be desired.

The order appealed from should, therefore, be modified so as to vacate and set aside the readjustment only, and this should be without costs of this appeal to either party.

*L. I. Burdett*, for the appellant. *Lynes & Van Horn*, for the respondents.

Opinion by BOOKES, J.; LEARNED, P. J. and BOARDMAN, J., concurred.

Order modified.

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PATRICK TIERNEY, PLAINTIFF, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, DEFENDANT.

*Perishable property—transportation of, by railroad company—duty of company as to—receipt for—Value—evidence as to.*

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a verdict in favor of the plaintiff, and appeal from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

The action was brought to recover damages alleged to have been sustained by the plaintiff, through the negligence of the defendant, in the transportation of a car-load of cabbages from Albany to New York.

The court at General Term said: "It is quite plain, I think, that a case was made for the jury on the evidence submitted. The property delivered for transportation was of a character recognized among carriers and forwarders as perishable; hence, required particular attention and a greater degree of care than would attach to such as is deemed non-perishable. It was received on the sixth and seventh of January; and due and proper diligence required that it should have been at once forwarded to the city of New York, its place of destination. It was in the car, ready for the freight train at East Albany at 10.40 P. M., from which place those trains were accustomed to leave

for New York every few hours, the running time being ordinarily about eleven hours. The car was left at East Albany for a considerable time, notwithstanding several trains were sent over the road, and did not reach New York until the tenth, and, as the plaintiff testified, until the thirteenth of January. In the meantime, the property was frozen and nearly destroyed. The defendant endeavored to explain and excuse the delay by showing an accumulation of freight at East Albany, but the evidence in support of this hypothesis was inconclusive, to an extent certainly which made it proper to submit the case to the jury on the proof. The learned judge properly held, and instructed the jury that, inasmuch as the property had been delivered and accepted by the company as perishable, it became its duty to forward it by the first train, unless there was such a pressure and accumulation of a similar kind of freight to be transported, and which had previously arrived, as to prevent such immediate action. This instruction to the jury was sound in law. The rule laid down was a reasonable and fair one; it imposed no unjust obligation upon the defendant. If, then, there had been no accumulation of freight for transportation, beyond the ordinary capacity of the road, all of it should have been forwarded in the order of its arrival; but if any delays were necessary, by reason of unusual accumulation, the perishable property should be forwarded in preference to that which was non-perishable. So the judge was right in holding that the defendant was bound to forward the car containing the plaintiff's perishable property, in case there was a pressure of freight cars to be forwarded, in preference to those which contained nonperishable property. \* \* \*

The plaintiff signed a receipt for the property in New York as 'in good order.' It was competent for the plaintiff to show the circumstances under which this receipt was given; and, on this point, he testified that he wanted to sign for the load, 'in poor condition,' but was not allowed to do so. The court held that he was not concluded by the terms of the receipt. In this, there was no error. The receipt was not of binding force as a contract; but, at most, was but an admission, and therefore susceptible of explanation and correction by parol evidence. (*Ellis v. Willard*, 9 N. Y., 529.) The plaintiff was allowed to testify against objection that he contracted for a sale of the cabbages at Washington market, in New

York, on the morning of the eighth of January, at from sixteen to twenty dollars a hundred. He also testified that he had dealt in the property and was acquainted with its market value; that the men with whom he contracted were regular dealers at that market, which was the greatest produce market in New York; and, further, that cabbages were worth from sixteen to twenty-five dollars a hundred, according to their quality. What he could obtain from dealers for the cabbages in that public market was evidence bearing on the question of value. This was admissible on that question. Certainly, it was not hurtful, in view of the other evidence as to value, which stood wholly undisputed in the case."

*A. J. Colvin*, for the plaintiff. *Matthew Hale*, for the defendant.

Opinion by BOOKES, J.; LEARNED, P. J., and BOARDMAN, J., concurred.

Order affirmed with costs, and judgment ordered on verdict.

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JEHIEL GRIFFIN, RESPONDENT, v. LEONARD P. WINNE,  
APPELLANT.

*Cutting timber — Injunction to restrain — not granted for mere threats, unaccompanied by acts.*

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

The action was brought to restrain the defendant from removing trees and cutting timber growing on lands owned by him, which the plaintiff claimed to be entitled to remove, by virtue of an agreement made with the defendant's grantors.

The court at General Term said: "The plaintiff claims a right to cut down timber on land now belonging to the defendant. By the judgment in this action the defendant is enjoined from cutting down such timber himself. It does not appear that the defendant had, previously to the commencement of the action, cut any of this timber. If, as it would seem, he had drawn away timber cut by the plaintiff, there was a sufficient remedy by action at law. The defendant had

threatened to sue the plaintiff if he should cut this timber. But as a general rule mere threats, unaccompanied by acts, do not warrant the extraordinary remedy of injunction.

There has been a tendency of late, as has been remarked in other cases decided in this court, to extend the remedy by injunction, and to apply it where the ordinary remedy of an action for damages was ample. We see no reason, in the present instance, if the plaintiff should be prevented from cutting the timber which he claims, or should in any way be deprived of it, why he might not be compensated sufficiently by an action for damages. There would be no difficulty in ascertaining the damages, and the defendant is shown to be responsible.

Furthermore, the plaintiff may, perhaps, hereafter, by some neglect, forfeit his rights under the contract. This might be a defense in the future to the defendant, if the plaintiff should attempt to cut the timber.

It is suggested that the action should be maintained to prevent a great number of actions for trespass. No action of that kind has yet been commenced. If such an action should be commenced, the parties might rest satisfied with the result and no similar action might ever be brought. There is no evidence, therefore, that numerous actions will be commenced.

For these reasons, we think the judgment should be reversed and a new trial granted, costs to abide the event."

*J. W. Barnum*, for the appellant. *Burditt & Brooks*, for the respondent.

*Opinion per Curiam.*

Present — LEARNED, P. J., and BOOKER, J.; BOARDMAN, J., not acting.

Judgment reversed, new trial granted, costs to abide event.

JAMES FORSYTH, APPELLANT, v. DANIEL HARTNETT,  
RESPONDENT.

*Reservation of right of way in lease—action for use and occupation.*

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a nonsuit ordered by the court.

The plaintiff was the owner of a lot fronting on the Hudson river. He leased it verbally to White & Co., "reserving the right of ferry-way, and of landing of ferry passengers crossing over the lot." There was no "particular location as to where the passengers should go." During this lease the defendant, running a ferry, landed at certain times on this lot, and on one occasion promised to pay the plaintiff for its use. The plaintiff now sues for use and occupation.

The court at General Term said: "Taking the language of the plaintiff himself, it cannot be said that any part of the lot was excepted from the lease to White & Co. The plaintiff expressly says that there was no particular location. White & Co. were the sole lessees of the lot. The plaintiff now insists that his claim is for the use and occupation of the slip or landing, and a way to and from the same across the lot. \* \* \* But the evidence seems to show that all which the plaintiff reserved was a right to use this ferryway; and that not exclusively. \* \* \* If White & Co. were the lessees, and if all which the plaintiff had was the right to use the ferryway, an action for use and occupation could not be maintained by him. There was no land which the defendant occupied.

So, too, in this same view, the defendant's promise to pay was without consideration. The plaintiff parted with nothing, and it does not appear that his consent to the defendant's landing at this place was of any value. Unless the plaintiff had the exclusive right then, the consent to the defendant's landing should have come from White & Co. in order to give it any validity."

*George A. Mosher*, for the appellant. *Edgar L. Fursman*, for the respondent.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., BOCKES and BOARDMAN, JJ.

Motion for new trial denied, and judgment ordered for defendant with costs.

WILLIAM B. BOYD, SHERIFF, ETC., APPELLANT, v. MELVILLE  
H. CRONKRITE, RESPONDENT.

*Practice — on nonsuit in County Court — Motion for new trial — County Court has no power to order exceptions to be first heard at the General Term.*

THIS action was first brought in a Justice's Court, where the defendant had judgment for his costs upon the verdict of a jury. The plaintiff thereafter appealed from said judgment and demanded a new trial in the County Court. After one verdict in the County Court, which was set aside, the case was brought on for a second trial in the County Court before a jury. After the plaintiff's counsel had opened his case to the jury and before any evidence had been offered, the defendant's counsel moved that the plaintiff be nonsuited and his appeal dismissed, on the grounds (1) that the action is not prosecuted in the name of the real party in interest; (2) that the action should have been commenced and prosecuted in the name of the sheriff of Steuben county; that his name and official capacity and designation should have been stated in the summons. The motion was granted and a recital of the facts, touching the ruling upon such motion, is contained in the papers, by which it appears "that the motion of the defendant's attorney that the plaintiff be nonsuited, was ordered by direction of the court." And it was further ordered that the plaintiff have sixty days to make and serve case and exceptions, and defendant the like time to serve amendments "to be heard at the General Term in the first instance, and that proceedings in the meantime be stayed."

The notice of appeal by the plaintiff is to the General Term, "from the order and decision of the County Court of the county of Schuyler, made in this action on the 23d day of February, 1876, nonsuiting the said plaintiff and refusing to allow him to introduce any evidence on the trial of said action."

The court at General Term said: "It is apparent that the plaintiff has erred in his practice. The order or decision, as contained in the papers, does not purport to dismiss plaintiff's appeal from the judgment of the Justice's Court, nor does the notice of appeal to the General Term indicate any such order. The plaintiff was nonsuited

in the ordinary way upon the trial. That was not an order to be appealed from. It was a decision or ruling in the progress of the trial, to be incorporated in the case and exceptions, and to be reviewed in connection therewith. The other portion of the order, purporting to send the case and exceptions in the first instance to the General Term, is a nullity. The court had no power to make such order.

The proper practice would have been for the defendant to have entered his judgment upon the nonsuit. The plaintiff then, upon his case and exceptions, could have moved for a new trial. If such motion were denied, he could then appeal to this court from such judgment and order. But the present appeal, if it can be called an appeal, is from no judgment and from no order, unless the order sending the case and exceptions here be within the appeal. (Code, § 344; 4 Wait's Pr., 341.) There being neither a judgment nor an order in the County Court, no appeal can be taken to the General Term. The appeal must, therefore, be dismissed for want of jurisdiction on our part to hear and determine the case upon its merits. It is not, therefore, deemed advisable to consider or express any opinion upon the merits. Should proceedings be had in the County Court by which a valid appeal may be taken to this court, the merits may then be properly and judicially disposed of.

The appeal is therefore dismissed, without costs."

*M. J. Sunderlin*, for the appellant. *O. P. Hurd*, for the respondent.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., BOOKES and BOARDMAN, JJ.

Appeal dismissed, without costs.

**Cases**  
DETERMINED IN THE  
**SECOND DEPARTMENT**  
AT  
**GENERAL TERM,**  
**May, 1877.**

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**LUR WINTJEN AND HENRY HARMS v. FRANCISCO  
VERGES AND OTHERS, RESPONDENTS, AND MATTHEW T.  
BRENNAN, LATE SHERIFF, IMPEADED WITH OTHERS, APPELLANT.**

*Action against sheriff and others — right of sheriff, to remove it to his own county —  
Code, § 124.*

The plaintiffs having purchased a quantity of sugar from H. & D., of New York, the price thereof, while in plaintiffs' hands, was attached by the sheriff of New York, under an attachment issued in an action against H. & D. Subsequently one V. brought an action against the plaintiffs, to recover the price of the sugar, claiming that he was the owner thereof, and that H. & D. were merely his agents to sell the same. This action was brought by the plaintiffs, in the county of Kings, against the sheriff and the attaching creditors and V., praying that they might be compelled to determine their conflicting claims to the sugar between themselves. *Held*, upon the application of the sheriff, that he was entitled, under section 124 of the Code, to have the place of trial changed to the county of New York.

APPEAL from an order made at the Special Term denying a motion made by the defendant Brennan, to change the place of trial of this action to the county of New York, of which county he was sheriff.

*Almon Goodwin*, for the appellant Brennan.

*Lucien Birdseye*, for the respondents Verges, Verges & Preston.



BAERNARD, P. J. :

The plaintiffs purchased a large amount of sugar of Huntingdon & Dorn. Before they had paid for the same the late sheriff of the city and county of New York, Brennan, levied on the unpaid price of the sugars by virtue of attachments against Huntingdon & Raymond, at the suit of Shafford, Shafford & Hewitts. Verges, Verges & Preston, sugar merchants of Porto Rico, claim the sugar and the price therefor, alleging that Huntingdon & Dorn were simply their agents to sell the sugar, which belonged to them. They commenced an action against the plaintiffs, Wintgen & Harms, to recover the price agreed to be paid, amounting to over \$40,000. The plaintiffs thereupon commenced this action against the sheriff and the attaching creditors, and Verges, Verges & Preston, asking that the conflicting claims of the defendants may be made the subject of an interpleader between them. The sheriff demanded that the trial be had in the city of New York, and, his demand not having been complied with, he made a motion to compel the change. The motion was denied. This appeal presents the question whether section 124 of the Code gives him the right to have the place of trial changed. This section provides that the place of trial against a public officer "for an act done by him in virtue of his office" be tried in the county where the cause, or some part thereof, arose. I think this statute covers this case. The sheriff is made a party because he has made a levy; for this act, and by reason of the consequences which flow from it, he is asked to litigate his claim with another claimant. It is urged by the respondent that the action is not against the sheriff for an official act, but that the only question presented is the validity of the lien created by him by the service of the attachments. There could be no such question but for the act of the levy. The same argument would permit trover or replevin to be brought against the sheriff, who had levied on goods claimed by another. The title to the goods, and the validity of the levy, are the only things in question. Still the action is based upon the fact of the levy.

It is also urged against the motion that no personal claim is made against the sheriff. It is true that no personal claim is made against the sheriff, but the issue between the sheriff and Verges, Verges & Preston may terminate in a judgment for costs against the sheriff. (*Richards v. Salter*, 6 Johns. Ch., 444.)

Possibly even in a judgment for the attaching creditor's debt, if the sheriff has been guilty of any neglect whereby the levy was invalid, and Huntingdon & Raymond are adjudged to have owned the sugar. The sheriff cannot be deprived of the statutory right by joining other defendants with him. (*People v. Kingsley*, 8 Hun, 233.)

The question is not varied by the removal of the attachment action to the United States Circuit Court. By section 646 of title 13, chapter 7, United States Revised Statutes, the attachment still holds the property to answer the final judgment.

I think the order should be reversed, and the motion to change the place of trial granted, with costs and disbursements.

GILBERT and DYKMAN, JJ., concurred.

Order reversed, with costs and disbursements.

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ALFRED M. WILES AND WILLIAM H. WILES, RESPONDENTS,  
v. LAMBERT SUYDAM, APPELLANT.

*Liability of trustees of manufacturing corporation, for a failure to file report—right of each creditor to maintain a separate action.*

Under section 13 of chapter 40 of 1848, providing that upon a failure to file the report required by the act, "all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made," each creditor of the company may maintain a separate action to recover the debt due him from the company, and it is not necessary that *all* the creditors should join in one action.

APPEAL from a judgment in favor of the plaintiffs, entered upon the trial of this action by the court without a jury.

A. H. Hitchcock, for the appellant.

George W. Weiant, for the respondents.

BARNARD, P. J. :

The defendant was the president and one of the trustees of the Imperishable Stone Block Pavement Company of New York city, a manufacturing corporation organized under chapter 40, Laws of 1848, and its subsequent amendments. The trustees neglected to file the report required by section 12 of the act, within twenty days after the 1st January, 1873, and they have neglected to make and file any report since that time.

The plaintiffs, in October, 1872, were the creditors of that corporation. All the facts necessary to charge defendant, individually, with the payment of that debt under the provisions of section 12 of the act, are averred and proven. The proof shows that the plaintiffs' debt was not the only debt existing at the time of the commencement of this action against the corporation, and the defendant claims that when there are several creditors who are entitled to sue for the same default, they must all be joined as plaintiffs in one action.

The words of the section, so far as material to this inquiry, are as follows :

"All the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made."

The claim of defendant is that no separate action is given to each individual creditor by the words, for his separate debt, when his is not the only debt against the corporation. We think the claim is not well founded. The construction to justify it is forced. The imposition of a liability to pay all the debts of the company would naturally mean a liability to pay each creditor his individual debt. So far as my experience goes, it has been the uniform practice since 1848, for each creditor to sue alone for his debt under this section. The construction called for by the defendant, would practically destroy the protection the law intended to give the creditor against the default of the trustees. How are "all the debts" to be known? If some are not due they cannot be joined. (*Jones v. Barlow*, 62 N. Y. Rep., 202.) Who can compel the other creditors to join with plaintiff? Some debt may be disputed by the trustees. What interest has a creditor whose debt is not disputed with the controversy? If the default to make and file the report continues, where

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SECOND DEPARTMENT, MAY TERM, 1877.

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is a rest to be made to determine what debts shall be joined with plaintiff? These debts may be created day by day until the report is made and filed. After a suit is commenced, which includes all debts due from the company to all its then creditors, what is to be done with the after-created debts? The defendant says the payment of "all the debts" is a "penalty," and there can be but one which must include all the debts, and this requires all the creditors to be plaintiffs. By constantly creating new debts, all liability will be at an end, so far as this section is concerned. In *Jones v. Barlow* (*supra*), a portion of the plaintiff's claim was stricken out as not due. This case not only recognizes that one creditor may sue, but that he may sue twice for his individual claim.

We think the judgment should be affirmed with costs.

DYKMAN, J., concurred. GILBERT J., not sitting.

Judgment affirmed with costs.

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SAMUEL C. BARR, RESPONDENT, v. JAMES M. SHAW  
APPELLANT.

*Malicious prosecution and false imprisonment — action for, may be alleged in different counts of the same complaint.*

A cause of action for a false imprisonment, and a cause of action for a malicious prosecution, when both arise out of one and the same transaction, may be respectively alleged in different counts of the same complaint.

APPEAL from an order made at the Special Term, denying a motion to compel the plaintiff to elect upon which of his counts or causes of action, set forth in his amended complaint, he will rely, and that the residue be stricken out as irrelevant.

The complaint contained a count of malicious prosecution, and also one for false imprisonment.

*John R. Dos Passos*, for the appellant. Under section 142 of the Code, it has been held that as there can be but one substantially true statement of a single cause of action. The practice of setting it forth in different counts is necessarily abolished. (*Stockbridge Iron Co.*

v. *Mellen et al.*, 13 How., 439; *Superly et al. v. The Troy and Boston R. R. Co.*, 9 id., 83; *Churchill v. Churchill*, id., 552; *Lacky v. Vanderbilt*, 10 id., 155; *Dunning v. Thomas*, id., 281 [Alb. Sp. T., March, 1855]; *Ford v. Mattice*, 14 id., 91; *Dickens v. N. Y. Cen. R. R. Co.*, 13 id., 228; *Nash v. McAuly*, 9 Abb., 159; *Hepburn v. Babcock*, in note to above case; *Moak's Van Sant. Plead.*, 150; 1 *Chitty's Plead.*, 243.) The defendant will be greatly prejudiced if this pleading is permitted to stand. The actions of malicious prosecution and for false imprisonment are entirely dissimilar, and the pleadings and evidence are different in each action. (*Brown v. Chadsey*, 39 Barb., 253; *Von Latham v. Libby*, 38 id., 339.) Section 144 of the Code (subd. 5), permitting a defendant to demur where several causes of action have been improperly united, has no relevancy or bearing upon the present application. In the present instance the charge is not that there are two distinct and separate causes of action, but that there are two statements of the same cause of action; and under all the decisions it would manifestly be improper to demur.

*I. T. Williams*, for the respondent. The defendant does not show that the few lines he now seeks to strike out are a grievance. No facts are stated from which the court can base any such apprehension. (*Brockleman v. Brandt*, 10 Abb., 141; *Malory v. Dows*, 15 How., 261.) Under the former system of pleadings, when the arrest was under color of legal process, it was the universal practice to insert a count for false imprisonment, or, what is the same thing, false arrest, with the count for malicious prosecution. (Saund. Pl. and Ev., 651.) In *Jones v. Palmer* (1 Abb., 442) all the judges of the Supreme Court in the city of New York held, upon consultation, that to set out a cause of action in two separate forms or counts, provided there is a fair and reasonable doubt of his ability to safely plead this in one mode only, was not a violation of this provision of section 142. (*Birdseye v. Smith*, 32 Barb., 217; *Sheldon v. Lake*, 9 Abb. [N.S.], 306, 308; *Sheldon v. Adams*, 41 Barb., 59.)

BARNARD, P. J. :

I think the two counts or causes of action proper in this case. The plaintiff was arrested upon the complaint of the defendant. The plaintiff avers this complaint to have been malicious and with-

out probable cause, and that he, the plaintiff, was discharged for the invalidity of the proceedings. Before his discharge he was imprisoned in the jail. To meet a possible variance in the proof or ruling upon the trial as to the validity of the arrest a count, or cause of action, for false imprisonment is added to one for malicious prosecution. If the arrest is established to be legal, then a cause of action strictly for malicious prosecution must be made out. If the arrest is held to be illegal, then, with a single count for malicious prosecution; a recovery for false imprisonment could only be had by proving the allegations of malice and want of probable cause, which are only important in an action for false imprisonment as affecting the damages. Such a pleading as the one in the present case tends to the attainment of justice. Whatever the plaintiff is entitled to he can recover in this action. There is no unnecessary repetition. (Code, sec. 142.) Order affirmed, with costs and disbursements.

GILBERT, J., concurred. DYKMAN, J., not sitting.

Order affirmed, with costs and disbursements.

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CHARLES W. SCOFIELD, APPELLANT, v. CHARLES  
DOSCHER, EXECUTOR, ETC., RESPONDENT.

*Foreclosure of mortgage—action to recover deficiency, after judgment of foreclosure and sale—leave of court to maintain—when necessary.*

In an action brought to foreclose a mortgage, the mortgagor and the executor of a person to whom a portion of the mortgaged premises had been conveyed, he having agreed to pay a portion of the mortgage, were made parties defendant, the executor being notified that no personal judgment would be taken against him. A deficiency having arisen upon the sale a judgment for deficiency was entered against the mortgagor. Subsequently, this action was brought against the executor to recover a judgment for the same deficiency against him. *Held*, that the plaintiff could not maintain the action, without first obtaining permission of the court so to do.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court without a jury.

*Theron G. Strong*, for the appellant.

*Benj. M. Stillwell*, for the respondent.

BARNARD, P. J. :

On the 1st April, 1872, one Peter Donlan executed and delivered to the plaintiff his bond, accompanied by a mortgage upon certain lands in the city of Brooklyn, to secure the payment of the sum of \$3,400, with interest. On the twentieth September thereafter Donlan sold a portion of the premises to Heiden, defendant's testator. As part of the consideration of the sale, Heiden agreed to pay \$2,050 of the principal sum secured by the mortgage held by plaintiff. On the 30th November, 1872, Donlan sold another portion of the mortgaged premises to Heiden, and, as part of this purchase-price, Heiden agreed to pay the further sum of \$700, part of the same mortgage. Heiden died in July, 1873, never having paid either of these sums, or any part thereof. In August, 1873, Doscher was appointed executor and qualified as such. In November, 1873, the plaintiff commenced an action in this court to foreclose the \$3,400 mortgage. Donlan, and Doscher executor of Heiden, were made defendants. The complaint asked for judgment for any deficiency which should arise upon the sale of the mortgaged premises against Donlon, but did not ask for any judgment against Doscher, as executor, for deficiency. Notice was served with the summons that no personal claim was made in the foreclosure action against Doscher as executor. He did not appear. Upon the sale there was a deficiency. Judgment was perfected in the action for the deficiency against Donlon. This action is brought to recover the same deficiency of the defendant as executor of Heiden. By 2 Revised Statutes 191, section 152, power is given to the Court of Chancery, in an action for the foreclosure of a mortgage, to render a judgment against the mortgagor for any deficiency arising upon the sale. Section 153 provides that no proceedings shall be had at law while foreclosure suit is pending, and after decree rendered thereon for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the Court of Chancery.

Section 154 provides that if the mortgage debt be secured by any other person besides the mortgagor, the complainant may make such

person a party, and have a decree for the deficiency against him as well as the mortgagor.

No leave of the court has been obtained to bring this action. Judgment was given for the defendant at the Special Term.

It is urged upon the argument as a reason for the reversal of the judgment, that no leave to sue is required in this case; that section 153, above cited, permits a judgment for a deficiency only against the mortgagor upon a bill filed for the satisfaction of a mortgage. Section 153 provides that, "after such bill filed," no proceedings shall be had at law for the recovery of the debt; that section 154, authorizing a judgment against persons "besides the mortgagor" who are liable to pay the mortgage debt, and providing that such persons "may" be made parties, and that the court "may" give judgment for the deficiency, is permissive merely, and not mandatory; hence, that a mortgagee may sue a person collaterally bound to pay the mortgage, without leave of the court; that section 153 does not cover the cases provided for in section 154. We think the argument is not good. The three sections were designed to make one system, and to be read together. Before the statute no judgment could be rendered for the deficiency upon a mortgage; consequently complete relief could only be obtained in two actions, one in chancery to sell the mortgaged premises, and another at law to collect the deficiency.

The statute provides that entire relief should be given in one action.

Section 153 is not restricted to actions against the mortgagor, but provides, "that no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage." It operates upon the mortgage.

Whether section 154 is mandatory or not, is of no consequence in this case. The person collaterally bound is made a party; no personal claim was made against him, and he was notified that no such claim was made against him. It is a fair inference that the executor suffered the sale to take place in consequence thereof, without protecting the property. The plaintiff was bound to ask and obtain all the relief he was equitably entitled to in that suit. (*Cook v. Grant*, 1 Paige, 407.) Judgment should be affirmed, with costs.

GILBERT and DYKMAN, JJ., concurred.

Judgment affirmed, with costs.



AUGUSTUS C. BECHSTEIN AND WILLIAM P. ROSS, APPELLANTS, v. CHARLES A. SAMMIS, SHERIFF, ETC., RESPONDENT.

*Action against sheriff, for failure to return execution — return of, nulla bona after commencement of action — effect of.*

After the commencement of an action, brought against the sheriff for a failure to return an execution within sixty days, he returned the same indorsed *nulla bona*. Upon the trial the plaintiff proved the issuing of the execution, and its return and indorsement after the commencement of the action. *Held*, That as the return was made by a public officer of an official act he was bound by law to make, it was evidence in favor of the officer making it. That its admissibility was not affected by the fact that it was made after the commencement of the action. That as the plaintiffs did not contradict the return, he was entitled to recover only nominal damages.

APPEAL from a judgment for costs in favor of the defendant, entered upon the report of a referee.

*Edward J. Cramer*, for the appellants.

*John J. Armstrong*, for the respondent.

BARNARD, P. J. :

The plaintiffs, on the 28th September, 1875, recovered a verdict against Henry Hodfield and John W. Hodfield for \$3,071.04. On the next day an execution was delivered to the sheriff of Queens county, where a transcript of the judgment had been filed. The sheriff did not return the execution within the sixty days. The plaintiffs brought this action against him for this neglect. After the action was brought, and before its trial, the sheriff returned the execution to the clerk's office with his return of *nulla bona* indorsed thereon. Upon the trial the plaintiff proved the judgment, the issuing and delivery to the sheriff of the execution, and produced and read in evidence a certified copy of the execution so returned, with the indorsement thereon. The plaintiff offered no other evidence, and the referee gave judgment for the plaintiff for six cents. The plaintiff appeals, and the only question presented is as to the effect

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SECOND DEPARTMENT, MAY TERM, 1877.

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of the sheriff's return. The return was made by a public officer of an official act he was bound by law to make. Such return is evidence in favor of the officer making it. (*Browning v. Hanford*, 5 Den., 586; *Board of Water Commissioners v. Lansing*, 45 N. Y., 19; *Russel v. Gray*, 11 Barb., 541; *Henderson v. Cuirns*, 14 Barb., 15.) It is evidence, notwithstanding it was made after the commencement of the action. (*Glover v. Whittenhall*, 2 Den., 633; *Birkbeck v. Stafford*, 14 Abbot Pr. Rep., 285.) When the plaintiff rested he had proven a cause of action against the sheriff, and that he had suffered only nominal damages.

It was competent for him to have contradicted the return, which is only *prima facie* evidence of its truth. Not having done so, the judgment is right, and should be affirmed with costs.

GILBEET and DYKMAN, JJ., concurred.

Judgment affirmed, with costs.

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MARCUS C. COOK AND CYREL R. ALDRICH, RESPONDENTS.  
v. H. HORWITZ AND OTHERS, APPELLANTS.

*Misjoinder — one action upon two distinct undertakings — demurrer.*

Defendant Horwitz having been arrested in an action brought by the plaintiffs to recover the possession of certain personal property, an undertaking was given on the third of April by the defendants Horwitz, Freudenthal and Dodds, by which they bound themselves that the defendant should, at all times, render himself amenable to process, etc., and for the payment to the plaintiffs of such sum as might be recovered against him. On the twenty-seventh of May, another undertaking was given by the defendants Dodds and Jopha, in the form and to the effect required by section 211 of the Code.

Plaintiffs having recovered judgment in the action, and an execution issued thereon having been returned unsatisfied, brought this action against all the sureties to both undertakings. *Held*, that a demurrer, interposed by the defendant on the ground of an improper joinder of separate causes of action, was proper and should be allowed.

APPEAL from an order overruling a demurrer to the complaint.

*John Berry*, for the appellants.

*Anthony Barrett* and *Chas. J. Patterson*, for the respondents.

BARNARD, P. J.:

The plaintiffs brought an action in the Kings County Court against the defendant to recover specific personal property. It seems the defendant secreted the property, and an order of arrest was issued against him under subdivision 3 of section 179 of the Code, which authorizes arrests, as follows:

"3. In an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof." Where an arrest is made under this subdivision 3, section 179, the defendant is required to give the undertaking required upon a redelivery of personal property to a defendant. (Code, 187).

This undertaking is provided for by section 211, and must be in double the value of the property, must have two sufficient sureties, and they must be bound "for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant."

On the 3d of April, 1875, the defendants Horwitz, Freudenthal and Dodds executed an undertaking in the sum of "\$1,400 that H. Horwitz shall, at all times, render himself amenable to the process of said court during the pendency of this action, and to such as may be issued to enforce the judgment thereon, and for the payment to the plaintiffs of such sum as may, for any cause, be recovered against the defendant."

To entitle the defendant to a release from other arrests under section 179 of the Code, the undertaking does not require the clause that the sureties would pay the sum recovered. To entitle himself to a release under subdivision 3 of this section a clause should have been added providing for a return of the property, and no liability was required for a failure upon the part of defendant to render himself amenable to process.

On the 27th May, 1875, the defendants Dodds and Japha executed an undertaking as called for by section 211.

The plaintiff had judgment in the action for the delivery of the personal property, and for the recovery of \$700, in case the same could not be had. Execution having been issued and returned

unsatisfied, the plaintiffs bring this action, setting forth both undertakings, and asking judgment against the signers of both.

The point presented by the demurrer is whether the joinder is right.

In *Wiles v. Suydam* (unreported) it was held by the Court of Appeals that if two causes of action were set out in one complaint a demurrer would lie, although they were not separately stated. "If, however, the complaint does contain several causes of action, and they are improperly united, the omission to state the cause of action in separate counts properly numbered does not deprive the defendant of the right to demurrer. (*Goldberg v. Alley*, not reported.)"

The case of *Wiles v. Suydam* is decisive of this in another particular. The action was against the defendant to recover a debt due the plaintiff therein from a manufacturing corporation. The defendant was a stockholder and trustee. The liability claimed against him was as stockholder under one of the manufacturing laws, and as trustee, for failure to make and file a report under another section. The defendant was liable to pay plaintiff's debt under both sections. The Court of Appeals held that the actions could not be joined. "The recovery of the debt is the object of the action, but a cause of action must have two factors: the right of the plaintiff and the wrong or obligation of the defendant." There is no provision of law requiring both the undertakings set forth in the complaint. It is possible that because the first was defective the second was given, but assuming that both were properly given, I think they cannot be joined in one action. They are not made by the same parties, and, therefor, each does not affect all the defendants; only one defendant signed both papers.

Japha had no interest in the first undertaking, and Horwitz and Freudenthal have none in the second. The grounds of liability are different. The first undertaking calls for amenability to process; the second does not. The liability arises under different papers executed at different times, and with different conditions and with different parties. There is no joint liability of all the defendants upon either paper. There is no allegation that the papers were given to effect a single purpose.

I think the order overruling the demurrer should be reversed,

and the demurrer sustained, with leave to plaintiff to amend in twenty days on payment of costs.

DYKMAN, J., concurred. GILBERT J., not sitting.

Order overruling demurrer reversed, and demurrer sustained, with leave to plaintiff to amend on payment of costs in twenty days.

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CHARLES G. FRANCKLYN AND ANOTHER, EXECUTOR, ETC., v.  
WILLIAM SPRAGUE AND OTHERS.

10 589  
11ap388

*Factor selling under del credere commission — rights of assignee or receiver of.*

Where a factor, acting under a *del credere* commission, fails, after having made advances to his consignor in the form of notes and acceptances, his receiver or assignee is entitled, as against the assignee and general creditors of the consignor, to retain in his hands the amounts arising from the sale of the goods, until such notes or acceptances are *surrendered* or destroyed.

APPEAL by the receiver and the plaintiffs in the above entitled action, from an order of the Special Term confirming the report of a referee.

In 1878, Birchall was a manufacturer of goods at Philadelphia. Hoyt, Spragues & Co. were commission merchants at New York. Birchall made an arrangement with Hoyt, Spragues & Co. to consign goods to them for sale on commission. Hoyt, Spragues & Co. guaranteed sales, and had the right to sell on credit. Birchall had the right to draw bills on Hoyt, Spragues & Co., to an amount of about two-thirds the value of the goods consigned.

On October 30, 1873, Hoyt, Spragues & Co. failed. There were then outstanding and unmatured eleven acceptances of Hoyt, Spragues & Co., for \$5,000 each, drawn by Birchall and negotiated in the ordinary course of business. Some appear to have been discounted by banks and some purchased in the market. Hoyt, Spragues & Co., or the receiver of the firm, have collected, since their suspension, \$22,784.19, principally on account of Birchall's goods sold before the suspension, upon terms of credit maturing thereafter.

On October 24, 1873, Birchall made an insolvent assignment, under the laws of Pennsylvania, for the benefit of his creditors, to Jones. Birchall and Jones both reside at Philadelphia.

In May, 1876, the holders of seven of these eleven drafts applied by petitions to this court, asking to have the receiver pay to them on account of their drafts the entire proceeds of Birchall's goods. A reference was ordered, testimony taken, and the matter summed up by counsel. Upon such summing up the counsel for the contestants raised the objection that Birchall, or his assignee, and the holders of the other four drafts ought to be parties to the proceedings. Thereupon, in November, 1876, the assignee and the holders of the four remaining drafts applied by petition, being represented by the counsel of the original petitioners, and were made parties to the proceedings. The holders of the last four drafts had already proved their claim against H. S. & Co., as general creditors, and received a dividend of ten per cent thereon.

There are other creditors of Birchall, to a large amount, besides the holders of these eleven drafts.

The receiver made a settlement of accounts with the assignee of Birchall, by paying him a balance of \$384.13. This was a balance of an account in which Birchall was charged with the face of the acceptances, \$55,000.

The referee reported, upon these facts, that said sum collected as aforesaid, with interest at two and a-half per cent, amounting to \$23,815.61, should be applied by the receiver, *pro rata*, upon said eleven drafts, to wit, \$2,165.05 on each draft; the four petitioners who had already proved as general creditors reducing their proofs by that amount.

*George C. Holt*, for Julliland, receiver, appellant.

*Addison Brown*, for the petitioner, respondent.

GILBERT, J. :

That the proceeds of goods consigned to a factor for sale on a *del credere* commission, in whatever form they exist, continue to be the property of the consignor, so long as such proceeds can be traced and identified, has been repeatedly adjudicated in this court. If the factor has made advances in cash he has a right to retain enough of

such proceeds to reimburse him therefor. If he has made advances in the form of his notes or acceptances, which are outstanding, the proceeds may be retained until such notes or acceptances shall have been surrendered or destroyed. A receiver or assignee of a factor, who has become insolvent, merely succeeds to his rights, and is under the same obligation to restore to the consignor the proceeds of his goods, which are distinguishable, as the factor himself. These principles are manifestly just and equitable, and are well sustained by authority. (2 Kent Com., 623; Edw. on Fac., § 70, 71; 1 Am. Lead Cas., 480-490; *German Bank v. Edwards*, 53 N. Y., 544; *Hidden v. Waldo*, 55 id., 294.)

In this case the consignor has become insolvent, and his assignee now seeks, in conjunction with certain creditors, to have the proceeds of his goods, which have been kept distinct, applied to the payment of drafts drawn by the consignor upon the factors, which are in the hands of third persons. We think such a disposition of the proceeds in question ought to be made for the reasons assigned by the referee. Order affirmed.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Order affirmed, with costs and disbursements.

SILAS A. UNDERHILL, RESPONDENT, v. FRANK H.  
PHILLIPS, APPELLANT.

*Promissory note — complaint in action upon — consideration need not be alleged.*

The omission of the words "for value received," in a promissory note, is not material.

In an action upon such a note, it is not necessary to allege in the complaint, that there was any consideration therefor.

A description of the note is sufficient without an averment of the consideration.

APPEAL from an order of the County Court of Kings county, overruling a demurrer to the complaint herein.

The action was upon a promissory note. The defendant demurred,

10	591
57	590
10	591
60	234
10	591
84	590

on the ground that there was no allegation in the complaint showing any consideration for the note, and because it did not appear therefrom that the note contained any words expressing a consideration.

*G. B. Van Wart*, for the appellant. If a written contract be defective in its specification, it must be declared on according to its legal effect, and the deficiency supplied by the proper averments. (*Osborn v. Lawrence*, 9 Wend., 135; *Coonly v. Anderson*, 1 Hill, 519; *Grannis v. Clark*, 8 Cow., 35.)

*S. A. Underhill*, respondent, in person. A promissory note imports a consideration, and it is unnecessary to state any in the pleading or to prove any upon the trial in the first instance. (*Bank of Troy v. Topping*, 13 Wend., 557; *Goshen Turnpike, etc., v. Hurtin*, 9 Johns., 217; *Sawyer v. McLouth*, 46 Barb., 350; *Powers v. French*, 1 Hun, 582.) It was not necessary that the complaint should allege that the note was delivered. (*Churchill v. Gardner*, 7 Term R., 596; *Peets v. Bratt*, 6 Barb., 662; *Keteltas v. Myers*, 19 N. Y., 231.)

GILBERT, J.:

The instrument set forth in the complaint is a negotiable promissory note. (1 R. S., 768, § 1.) In this State such a note imports a consideration. A description of the instrument is sufficient, without an averment of the consideration. No consideration need be proved on the trial, and none, therefore, need be alleged in the complaint. The omission of the words "for value received" in the note, is not material. (1 Chitty's Pl., 293, n. 1; *Kimball v. Huntington*, 10 Wend., 675.)

The demurrer was properly overruled. Order affirmed, with costs.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Order overruling demurrer affirmed, with costs.



STEPHEN M. SHERWOOD, ADMINISTRATOR, ETC., RESPONDENT,  
v. THE AGRICULTURAL INSURANCE COMPANY OF  
WATERTOWN, NEW YORK, APPELLANT.

10 593  
9ap345

*Policy of insurance — transfer of interest by assured — when policy avoided by — Notice of loss — laches in presenting — excuses for.*

This action was upon a policy of insurance, issued by the defendant, containing a condition that "if, without the written consent of the company first had and obtained, the said property shall be sold or conveyed, or the interest of the parties therein be changed in any manner, whether by act of the parties or by operation of law, \* \* \* then, and in every such case, and in either of said events, this policy shall be null and void." The assured died in 1872, and devised the property to his brother. The loss occurred in 1874. *Held*, that as the interest of the assured in the property had ceased, and he had transferred the same to another person before the occurrence of the loss, no action could be maintained upon the policy.

The policy provided that "in case of loss the assured shall give immediate notice thereof to the company." No proofs of loss were given in this case, until after the expiration of five months. *Held*, that the policy was thereby avoided.

APPEAL from a judgment in favor of the plaintiffs, entered upon the trial of this action by the court without a jury.

This action was brought upon a policy of insurance issued by the defendant. The policy provided that "if any other insurance has been or shall hereafter be made upon the property hereby insured, not consented to by this company in writing hereon; or if, without the written consent of this company first had and obtained, the said property shall be sold or conveyed, or the interest of the parties therein be changed in any manner, whether by act of the parties or by operation of law; or the property shall become incumbered by mortgage, judgment or otherwise, \* \* \* then, and in every such case, and in either of said events, this policy shall be null and void;" and that "in case of loss the insured shall give immediate notice thereof to the company, stating the number of the policy and name of the agent. Any neglect to comply with these provisions, or any misrepresentations, or concealment, or fraud, or false swearing, in any statement or affidavit in relation to loss or damage, shall forfeit all claim upon the company by virtue of this policy, and shall be a full bar to all remedies upon the same."

*Starbuck & Sawyer*, for the appellant.

*M. L. Cobb*, for the respondent.

GILBERT, J. :

It appears from the findings of fact, that the assured died on or about November 2, 1872; that the loss occurred August 27, 1874; that the assured left a will, by which he gave the property insured to his brothers, and that each of the policies upon which the action is founded contains the following conditions, namely: "If any other insurance has been or shall hereafter be made upon the property hereby insured, not consented to by this company, in writing, hereon, or if without the written consent of the company first had and obtained, the said property shall be sold or conveyed, or the interest of the parties therein be changed in any manner, whether by act of the parties or by operation of law, or the property shall become incumbered by mortgage, judgment or otherwise, then and in every such case and in either of said events, this policy shall be null and void." The limitation of this condition to a change of title otherwise than by will, is not, we think, warranted. Nor does the language of the condition require a construction which renders the written consent of the insurer to the death of the assured, a prerequisite to the continued operation of the policy. A more reasonable construction is, that such consent is necessary only in case of a sale or conveyance of the property insured, and that the prohibition of other modes of transfer is absolute. Such is the grammatical sense; and it is but just to infer that the parties to the contract did not intend to provide for obtaining a preliminary consent in the other cases mentioned in the condition. Consent of the insurer would afford complete protection to the assured and all claiming under him, although not provided for in the policy.

Such being the contract between the parties, and it being a perfectly valid and reasonable one, the defendant has a legal right to have it carried into effect. (*Savage v. Howard Ins. Co.*, 52 N. Y., 504; *Perry v. Lorillard Ins. Co.*, 61 N. Y., 214.)

There is no ambiguity in the language employed. If the interest of the insured in the property insured should be changed in any manner, whether by his own act or by operation of law, the policy

should become null and void. When the loss occurred the property did not belong to the assured or his legal representatives, but had, by means of his act, been transferred to others. Plainly, therefore, such change in the ownership of the property annulled the policy, and, by the explicit terms thereof, the liability of the defendant under it wholly ceased. The case of *Lappin v. The Charter Oak Ins. Co.* (58 Barb., 325) is an authority directly in point, and we concur entirely with the reasoning and conclusion on this subject expressed in that case.

We are of opinion, also, that the court below improperly overruled the defense based upon the omission to give immediate notice of the loss. Five months elapsed after the fire before the notice was given. A notice at that time was clearly insufficient to exonerate the plaintiff. (*Inman v. Western Fire Insurance Co.*, 12 Wend., 452; *McEvers v. Lawrence*, 1 Hoff. Ch. R., 172.) The excuse offered was sufficient to exonerate the plaintiff from blame, but it cannot be taken as a legal substitute for the performance of the condition requiring "immediate notice" to be given. Such condition is a precedent one, the non-performance of which precludes a recovery by the plaintiff. Accident or misfortune happening to the party who is bound to perform such a condition, unless caused by the adverse party, will not excuse performance. (*Oakley v. Morton*, 1 Ker., 25; *Harmony v. Bingham*, 2 id., 99; *Tompkins v. Dudley*, 25 N. Y., 272.)

The discrepancy between the actual value of the property, as agreed upon by the parties, and that set forth in the proofs of loss, is, certainly, strongly indicative of fraud; but as the case does not contain a finding on that subject, or the evidence relating to it, we think that question is not properly before us.

The judgment must be reversed, and a new trial granted, with costs to abide the event.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment reversed and new trial granted at Circuit, costs to abide event.

SAMUEL CRAIGHEAD AND OTHERS, AS EXECUTORS, ETC., OF  
SAMUEL N. PIKE, DECEASED, APPELLANTS, v. ROBERT  
PETERSON, RESPONDENT.

*Power of attorney — construction of.*

Defendant executed a power of attorney, by which he appointed one Packard his  
“ true and lawful attorney for me and in my name, and place, and stead, to draw  
and indorse any check or checks, promissory note or notes on any bank in the  
city of New York, in which I have an account, and especially in the Irving  
National Bank of said city, and to do any and all matters and things connected  
with my account in said Irving National, or any other bank in said city  
which I myself might or could do,” etc. *Held*, that Packard was not author-  
ized thereby to draw or indorse any check or note, except such as were payable  
at a bank in which the defendant had an account.

APPEAL from a judgment in favor of the defendant entered upon  
the verdict of a jury, and from an order denying a motion for a new  
trial made upon the minutes of the justice before whom the action  
was tried.

The action was brought upon two promissory notes, made to the  
order of the plaintiffs' testator. The notes were made in the name  
of the defendant, though they were not signed by him personally  
but by his son-in-law Abiel R. Packard, who claimed to be acting  
under a power of attorney, signed by the defendant, of which the  
following is a copy :

*“ Know all men by these presents, that I, Robert Peterson, of the  
city, county and State of New York, have made, constituted and  
appointed, and by these presents do make, constitute and appoint  
Abiel R. Packard, of said city, my true and lawful attorney for me  
and in my name, place and stead, to draw and indorse any check or  
promissory note or notes  
checks ^ on, any bank in the city of New York, in which I may  
have an account, and especially in the Irving National Bank of said  
city, and to do any and all matters and things connected with my  
account in said Irving National, or any other bank in said city, which  
I myself might or could do, in relation to my deposit account with  
said Irving National, or any other bank, giving and granting unto*

my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

"In witness whereof, I have hereunto set my hand and seal the eighth day of October, in the year one thousand eight hundred and sixty-nine.

"ROBERT PETERSON. [L. s.]

"Sealed and delivered in the presence of }

"The words 'promissory note or notes' first interlined.

"JNO. S. PATTERSON."

The notes were both made payable at the Park National Bank of New York, at which bank defendant kept no account.

The plaintiffs endeavored to show that the defendant had adopted or ratified the act of Mr. Packard, by the execution of a mortgage to secure their payment, which the defendant, by showing that the mortgage was obtained by misrepresentation and fraud, and that there was no intention on the part of the defendant to ratify the making of said notes, and an entire want of knowledge on his part that he was doing any thing having that tendency.

This question was submitted by the court to the jury, who found for the defendant.

*A. C. Fransioli*, for the appellants.

*W. H. & D. M. Van Cott*, for the respondent.

GILBERT, J. :

We are of opinion that the court below correctly held that the notes in controversy were not within the power of attorney. That instrument is inartificial. Still the language used in granting the particular authority plainly imports a limitation of the power of the agent, to checks and notes payable at a bank in which the principal had an account, and the general language which follows does not affect that limitation. General language of that kind confers only such powers as are usual and proper for the execution of the par-

ticular authority. (*North R. Bk. v. Aymar*, 3 Hill, 262; *Holt-singer v. Nat. Corn Exch. Bk.*, 6 Abb. Pr. [N. S.], 292.)

The question of ratification was one of fact. There was sufficient evidence that no ratification was made to require the submission of that question to the jury. Nor do we perceive any error in the admission of testimony. That to which the plaintiff now objects bore more or less directly on the question of ratification, and was pertinent to show the intent and object of the defendant and his wife in executing the mortgage, which is relied upon as an act of ratification, and, also, that they were not apprised of the purpose which the plaintiff sought to accomplish thereby. Ratification depends very much upon intent. Evidence which serves to illustrate that is always competent.

Judgment and order denying new trial affirmed, with costs.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment and order denying new trial affirmed, with costs.

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URIEL A. MURDOCK, APPELLANT, v. THE PROSPECT  
PARK AND CONEY ISLAND RAILROAD COMPANY,  
RESPONDENT.

*Injunction — use of highway by railroad company — consent of owner thereto — effect of.*

In an action for an injunction, to prevent a railroad corporation from running its cars over a portion of a highway in front of plaintiff's land, the fee of which, subject to the public use, was in plaintiff, who had never received compensation for the use of said highway by the company, it appeared that the company was induced to construct its railroad upon said avenue by the express consent and license of the plaintiff. *Held*, that plaintiff was not entitled to an injunction.

APPEAL from a judgment in favor of the defendant entered at the Kings County Special Term, brought by an owner of land on Gravesend avenue, in Brooklyn, to enjoin and restrain the defendant from going with its railway through, over or across any portion of the said owner's land, and for damages for acts in this regard already committed by defendant. The justice before whom the action was tried found, among others, the following facts:

That the defendant was a corporation duly organized and existing according to law; that the plaintiff was the owner of the lands and real estate described in the complaint, and that the defendant has not made any compensation to the plaintiff for any portion of said land; that, under and in pursuance of chapter 670 of the Laws of 1869, and the acts amendatory thereof, and of chapter 531, Laws of 1873, and the acts amendatory thereof, an avenue known and called Gravesend avenue was opened, laid out and graded and regulated from Tenth avenue and Twentieth street, in the city of Brooklyn, to avenue X in the town of Gravesend, and was and had been since on or about June 1, 1875, an existing public highway of the towns of Flatbush, New Utrecht and Gravesend; that said avenue constituted a part of the route of the defendant's railroad, and the defendant's road was built upon, and operated on and over said highway in said towns to avenue X, and the defendant was authorized by law to construct and operate its railroad with steam power over and upon said avenue, and that said avenue ran through the property of said plaintiff, described in the complaint; that commissioners were duly appointed pursuant to law and the statutes above referred to, to open, lay out, grade and regulate said Gravesend avenue, and that said commissioners did proceed to lay out, open, regulate and grade said avenue, and to make awards to owners of lands taken for such avenue, and awards for all damages sustained by the owners by reason of the taking of said lands for said avenue; that the said commissioners did make an award to the plaintiff for such land so taken from him, and for his damages by reason of such taking, which award had been confirmed by this court, and the plaintiff had received the same; that the defendant entered upon the lands in said avenue with the express permission and consent and under a license from the plaintiff; that, induced by the express consent and license of the plaintiff, the defendant did construct its railroad in and upon said avenue, and had expended large sums of money in said construction. (The plaintiff in his evidence stated that he had never consented to the use of the road by the defendant.) As conclusions of law upon the foregoing facts, the justice decided: 1. That the plaintiff's complaint be dismissed. 2. That the defendant recover of and from the plaintiff its cost of this action, including extra allowance of \$100.

*Chittenden & Fiero*, for the appellant. That under special act of the legislature, chapter 531, Laws of 1869, and the act amendatory thereof, under which defendant claims to be authorized to appropriate Gravesend avenue for its railway, an easement only was taken for the public use; the fee remains in plaintiff, subject to the right of the people to use the land as a street or highway. Therefore, defendant could not take possession of this street or highway without making compensation to the plaintiff. (*The Washington Cemetery v. The Prospect Park and Coney Island R. R. Co.* [7 Hun, 655]; *Williams v. N. Y. C. R. R. Co.*, 16 N. Y., 97; *Mason v. N. Y. C. R. R. Co.*, 24 id., 658; *Carpenter v. Oswego R. R.*, id., 655; *Wager v. Troy Union R. R.*, 25 id., 526; *Broistedt v. Southside R. R.*, 55 id., 220.) The laying out of a highway gives the public a mere right of passage with the powers and privileges incident to such right, and the owner of the soil over which the road passes is not thereby divested of his title to the land. (*The Trustees of the Presbyterian Society in Waterloo v. The Aub. and Roch. R. R.* [opin. by NELSON, Ch. J.], 3 Hill, 567; *Kelsey v. King*, 33 How., 39; *Craig v. Roch. and B. R. R.*, 39 N. Y., 404.) The legislature must expressly provide for the taking of the fee, or the road must pay damages consequent on the additional burden to property owners. (Laws of 1813, 2 Rev. Stat., 409; *People v. Kerr*, 27 N. Y., 188.) The following decisions are against the right claimed by defendant: *Miller v. The Auburn and Syracuse Railroad Company* (6 Hill, 61); *Mumford v. Whitney* (15 Wend., 380); *Bridges v. Purcell* (1 Dev. & Batt., 492; see, also, 1 Chit. Gen. Pr., 336-340). In *Hewlins v. Shippan* (5 Barn. & Cress., 221) it was held that an easement could not be granted by *parol license*. (*Eggleston v. N. Y. and Harlem R. R.*, 35 Barb., 162; *Mumford v. Whitney*, *supra*; Browne on Statute of Frauds, 29, 30; *Cook v. Stearns*, 11 Mass., 533.) A mere license is personal to the licensee, and is not assignable. (*Mendenhall v. Klinck*, 51 N. Y., 246; Gerard on Titles to Real Estate [2d ed.], 662, and authorities there cited; Hillard on Real Prop., 16; *Babcock v. Utter*, 1 Keyes, 397, and 32 How., 439; 1 Wash. Real Prop., 414; 4 Sandf. Ch., 72.)

*John H. Bergen*, for the respondent. The license by the plaintiff to the defendant to construct the road is proved and is admitted



by the plaintiff. This constitutes a perfect defense. (*Marble v. Whitney*, 28 N. Y., 297; *People v. Goodwin*, 1 Seld., 568; *Selden v. Del. and Hud. Canal Co.*, 29 N. Y., 634; *Muller v. Auburn, etc., R. R.*, 6 Hill, 61; *Eggleston v. N. Y. and H. R. R.*, 35 Barb., 172 [opin. per EMOTT, J.].) The right granted by the license to the defendant was more than an easement; it was a qualified interest in the land, or a right of *profit a prendre*. (*Senhouse v. Christian*, 1 Term. R., 560; *White v. Crawford*, 10 Mass., 188; *Goodrich v. Burbank*, 12 Allen [Mass.], 459; *Bowen v. Connor*, 6 Cush., 137; *Bailey v. Stephens*, 12 Com. Bench [N. S.], 110; *Muskit v. Hill*, 35 Eng. Com. L., 371, 694; *Borst v. Empie*, 1 Seld., 33, and cases cited.) It is clear from all the cases that until the license is revoked no action will lie. (*Selden v. H. and D. Canal Co.*, 29 N. Y., 639.) The statute of frauds does not apply to such a license. (*People v. Goodwin*, 1 Seld., 568.) The road having been constructed under the license of plaintiff, he is estopped from denying the legality of the act. (*Marble v. Whitney*, 28 N. Y., 307.) Under the act of 1873 the land was taken concurrently for the two *uses of a highway and railroad*, and the award made for all the purposes of the act, which plaintiff has accepted. (*In the Matter of the Prospect Park and C. I. R. R. Co.*, Ct. of App. [opin. of FOLGER, J.].)

PRATT, J.:

It is found by the court at Special Term that the acts of defendant, now complained of, were done in accordance with the expressed wish of the plaintiff, and that finding was warranted by the testimony. Upon that state of facts no trespass was committed.

Having induced the defendants to expend large sums of money in building the road, it would be contrary to all principles of equity to enjoin its operation.

The judgment must be affirmed with costs.

Present — BARNARD, P. J., PRATT and DYKMAN, JJ.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF  
IN ERROR, v. JACOB HARTMANN, JUNIOR, AND GEORGE  
FISHER, COMMISSIONERS OF EXCISE OF THE TOWN OF EAST-  
CHESTER, DEFENDANTS IN ERROR.

*Excise law — petition of twenty freeholders — Hotel and tavern license.*

The provisions of section 6 of chapter 628 of 1857, requiring a petition of twenty freeholders as a prerequisite to the granting of a license for the sale of spirituous liquors, is repealed by section 4 of chapter 175 of 1870, as amended by section 2 of chapter 549 of 1873.

The provision of said act, forbidding the granting of licenses to persons not having sufficient ability to keep a tavern, and not having the necessary accommodations to entertain travelers, is still in force.

APPEAL from a judgment of the Court of Sessions of Westchester county in favor of the defendants in error, entered on a motion to quash an indictment found against them in said court, as commissioners of excise of the town of Eastchester, for granting licenses contrary to the provisions of section 6 of chapter 628 of 1857.

*Wm. H. Van Cott*, for the plaintiffs in error.

*W. Bourke Cockran*, for the defendants in error.

DYKMAN, J. :

The defendants were indicted for improperly granting licenses for the sale of spirituous liquors, as commissioners of excise of the town of Eastchester, in Westchester county. In various ways and in different counts in the indictment the defendants were charged with granting license to various persons to sell spirituous liquors, to be drank on the premises, without the presentation of a petition signed by twenty freeholders of the State residing in the election district where the tavern was proposed to be kept; second, with granting license to sell spirituous liquors, to be drank on the premises of the person licensed, in cases where such person had not sufficient ability to keep a tavern, and had not the necessary accommodations to entertain travelers; and third, with granting licenses to persons who were not of good moral character.

The district attorney obtained permission to enter a *nolle prosequi* upon the counts which charged the last offense, and then, upon motion of the defendants, the court quashed the indictment in respect to the counts which charged the two first-named offenses and gave judgment for the defendants.

The first question presented here is, has section 6 of the Laws of 1857, chapter 628, been so far abrogated by section 4 of chapter 175 of the Laws of 1870, as amended by section 2 of chapter 549 of the Laws of 1873, as to dispense with the necessity of a petition by twenty freeholders as a prerequisite to the granting of a license for the sale of spirituous liquors to be drank on the premises. In the case of the *People v. Smith* (9 Hun, 446), in the fourth department, it was held by the General Term that the provisions of the law were so abrogated, and that license for the sale of spirituous liquors to be drank on the premises, might be granted by the commissioners of excise to any person of good moral character approved by them on the written application signed by the applicant only.

It is not intended to assert that any such or similar language was used by the court in the opinion in that case, but simply that such is the doctrine and teaching of that case. Now, this decision has since been reversed in the Court of Appeals, but not upon this point; and, as we understand the opinion, it is to the effect that no petition of freeholders is now necessary. Even if we were not bound by this decision, we should have no hesitation in holding the same way. As to these counts in this indictment, therefore, which charged these defendants with this offense, the judgment of the court below is right.

Now, as to the second question, this indictment contains two counts which charge, substantially, that these defendants had granted license to various persons to sell strong and spirituous liquors, who had not sufficient ability to keep an inn, tavern or hotel, nor the necessary accommodation to entertain travelers.

These allegations bring this case directly within the principle decided by the Court of Appeals in the case of *The People v. Smith*. There the defendant was indicted for selling strong and spirituous liquors in quantities of less than five gallons at a time, to be drank on his premises, without having a license therefor as a hotel-keeper. The jury found him guilty. There was no question

but what he did sell in the quantities named, to be drank on his premises, nor but that he did so without having a tavern license. His defense was, however, that he had license from the excise board to sell on his premises in the quantities named, under and in pursuance of the law of 1870, as amended by the law of 1873. The Court of Appeals held that this was not sufficient, and reversed the decision of the General Term, and affirmed the conviction.

This seems to be decisive of this case; and we hold, in accordance with it, that the tenth and eleventh counts in this indictment charged an offense which was indictable.

The court below was in error in quashing the indictment as to these two counts, and the judgment must be reversed.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment reversed and new trial granted.

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IN THE MATTER OF THE PETITION OF BETSEY A. MERRILL v.  
JOHN J. ANDERSON, RECEIVER OF THE CONTINENTAL LIFE  
INSURANCE COMPANY.

*Settlement of loss with insurance company — check of company — withdrawal of money by the receiver of the company, before presentation of the check.*

A life insurance company settled a loss accruing under a policy issued by it, and delivered a check for the amount to the claimant, drawn upon the United States Trust Company, where the company then had a deposit largely in excess of the amount thereof. The claimant indorsed, upon the back of the check, a receipt in full for all demands under the policy. Before indorsement and presentation of the check a receiver of the company was appointed, who withdrew all the funds from the trust company. *Held*, that the claimant was entitled to have the amount of such check paid by the receiver out of the funds so withdrawn.

APPEAL from an order made at the Special Term, directing the receiver of the Continental Life Insurance Company to pay to the petitioner the amount of a check drawn by the company prior to the appointment of the receiver.

*Elliott F. Shepard*, for the petitioner. The draft of the Continental Life Insurance Company was on a particular fund in the United States Trust Company (not a banker, but a trustee), and the draft operated as an equitable assignment of \$7,820.67 of those funds to the petitioner. (*Vreeland v. Blunt*, 6 Barb., 182; *Hosack v. Rogers*, 6 Paige, 415-429.) In equity, an order given by a debtor to his creditor upon a third party, having funds of the debtor to pay the creditor out of such funds, is a binding equitable assignment of so much of said fund. (*Hall v. Buffalo*, 1 Keyes, 193; *Burn v. Carvalho*, 4 M. & C., 690; *Morton v. Naylor*, 1 Hill, 583-585.) Such a draft, without acceptance, is an assignment, and good against the bankruptcy assignee of drawer. (*Yates v. Groves*, 1 Ves., Jr., 280.) No particular form of words is necessary to constitute an assignment. An intention to surrender all control over the fund is sufficient. (*Dickenson v. Phillips*, 1 Barb., 454.) It can be enforced, even though the drawee refuse acceptance. (*Lett v. Morris*, 4 Sim., 607.) Such a draft is a valid, equitable assignment of the fund *pro tanto*. (*Bradley v. Root*, 5 Paige, 632; *Re Alderson*, 1 Mod. R., 55; *Clark v. Mauran*, 3 Paige, 373.) An order drawn by a creditor on his debtor is a *prima facie* evidence of an assignment of the debt *pro tanto*. (*McEwen v. Johnson*, 7 Cal., 258.) Any act amounting to an appropriation of a debt, will constitute an assignment of it. No particular form of transfer is essential. (*Wiggins v. McDonald*, 18 Cal., 126.)

*Sewell & Pierce*, for the receiver. A check is not an assignment of the fund on deposit in the hands of the banker. It is not even an equitable assignment. The holder of a check cannot sue the banker, and has no claim on the fund in case of refusal to pay. (*Bank of Republic v. Millard*, 10 Wall., 152; *Chapman v. White*, 2 Seld., 412; *Etna v. Fourth Nat. Bk.*, 46 N. Y., 82; *Bellamy v. Majoribanks*, 8 E. L. and Eq., 523; *Dykus v. Leather Bk.*, 11 Paige, 612; *Harris v. Clark*, 3 Comst., 93; *Cowperthwaite v. Sheffield*, 3 N. Y., 243; *Winter v. Drury*, 5 N. Y., 525; *Schneider v. Irving Bk.*, 1 Daly, 500.)

DYKMAN, J.:

The Continental Life Insurance Company insured the life of Albinus C. Merrill in the sum of \$10,000, payable at his death to

the petitioner, Betsey A. Merrill. The insured died in September, 1876, and the company adjusted the loss with the petitioner at \$7,820.67, and delivered to her a check for that sum, of which the following is a copy :

“(No. 792.)

“CONTINENTAL LIFE INSURANCE COMPANY OF NEW YORK, }  
NEW YORK, *October 14, 1876.* }

“\$7,820.67. *United States Trust Company.* (Claim 14,214.)

“Pay to the order of Betsey Ann Merrill seventy-eight hundred and twenty dollars and sixty-seven cents.

“CONTINENTAL LIFE.

{ Internal Revenue, }  
{ two cent stamp. }

“R. C. FROST,  
“*Acting President.*

“J. P. ROGERS, *Secretary.*

“\$7,820.67.”

On the back of this check was the following indorsement :

“This check is accepted as full payment of all claims on policy No. 14,214.

“MERRILL.”

At the time this check was drawn, the insurance company had \$21,074.94 on deposit with the trust company, but before the check was indorsed by the petitioner and presented for payment, a receiver of the company had been appointed, and the funds had been withdrawn, and when the check was presented for payment it was refused for want of funds. Now the petitioner asks to have this sum paid to her by the receiver, and an order has been made at Special Term that it be so paid. From that order an appeal is now taken, and we have to determine whether this money which was so appropriated to the payment of this claim can be taken by the receiver and placed in the common fund, and used for the payment of the debts of this insolvent corporation, and the petitioner thus be compelled to take her share of her claim the same as the other creditors.

The statement of the case shows that the company had settled with the petitioner and adjusted her claim, and had a special deposit with the trust company to secure that settlement, which was

intended to be appropriated by the check drawn against it. An equitable claim upon this fund was thus created in favor of the petitioner, and the receiver took the fund subject to this equity. In fact, the receiver never should have withdrawn this money from the trust company. The insurance company was bound by the settlement, and he was bound in the same manner, and to the same extent. After the delivery of the check to the petitioner, both equity and fair dealing would forbid the withdrawal of the fund out of which the check was to be paid, and we cannot give our sanction to such a course of conduct.

The order appealed from must be affirmed, with costs.

Present—BARNARD, P. J., and DYKMAN, J. GILBERT, J., not sitting.

Order affirmed, with costs and disbursements.

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EDWARD H. SEAMAN, RESPONDENT, v. LUTHER B. LEE  
AND GEORGE W. LEE, APPELLANTS.

*Stream — right of user by riparian owner — pollution of — remedy of party aggrieved by.*

Plaintiff built three ponds, for hatching and rearing trout, in a stream running through his land, which entered the same from the land of Hicks. Defendants dug a ditch from the rear of certain dwellings, erected by them, through Hick's land to the stream, and discharged drainage and waste water therein, whereby plaintiff's trout were killed. *Held*, that he was entitled to an injunction restraining the defendants from further corrupting and polluting the said stream.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was brought by the plaintiff to restrain the defendants from using a ditch, that they had dug to carry off waste water from their houses into a brook that fed the trout ponds of the plaintiff, and from fouling and corrupting the said stream; and also to recover damages for the loss of trout, occurring by the above acts.

*Samuel D. Morris*, for the appellants.

*Wm. H. Onderdonk*, for the respondent.

DYKMAN, J. :

The facts established by the testimony and found by the referee in this action are, that the plaintiff is the owner of a farm of land in Queens county ; that a stream of water comes on to it from the land of William S. Hicks, on the north, and flows through it ; that the plaintiff has constructed three ponds on his land on the line of the stream for the purpose of breeding, propagating and growing trout, and has stocked each of these ponds with trout ; that the defendants are the owners of land adjoining the land of Hicks, near to this stream, and have dug a ditch from the rear of their dwelling-house to this stream ; that the drainage and waste waters, containing refuse matter, were carried through this ditch in the summer of 1874, into this stream, and by this stream into the plaintiff's ponds, and corrupted the waters thereof and caused the death of 720 trout in these ponds, which belonged to the plaintiff, and which were worth fifty-six dollars ; that the defendants at the time of the commencement of the action were using the ditch or drain for conveying off waste water, which contained unwholesome and injurious substances, and thus polluted and corrupted the waters of this stream and rendered the same impure and unwholesome.

The law applicable to this state of facts is not open to uncertainty.

The plaintiff has no property in the waters of this stream as it passed along through his land, but he had a right to its use ; he had a right to have it come into his land pure and in its natural course and way.

As water, like air, is an element in which no person can have an absolute property, yet, it is also, like air, free for the use of all, and the law has been diligent and rigorous to maintain it in its natural purity ; and any person who does any act to it is liable to an action for damages, and may be restrained from doing so by injunction.

The referee has found, upon sufficient evidence, that the defendants have fouled this stream of water and that the plaintiff has sustained damages thereby.

The judgment must be affirmed, with costs.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment affirmed, with costs.



BENJAMIN T. HALL, RESPONDENT, v. JAMES PETTIGROVE,  
APPELLANT.

*Mechanic's lien — effect of mortgage taken to secure same debt.*

Plaintiff entered into an agreement with defendant, who was in possession of land under a contract, to repair a building thereon for \$3,286, and took a mortgage upon other land to secure said sum. Upon the completion of the work he filed a mechanic's lien, foreclosed the mortgage, realizing thereby \$1,025, and entered a personal judgment for deficiency.

In an action to foreclose the lien, it was claimed that by taking and foreclosing the mortgage and entering the judgment he had waived his right to the lien. *Held*, that he was entitled to pursue all the remedies he had, until he realized the amount of his claim.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

DYKMAN, J.:

This is an appeal from a judgment entered upon the report of a referee, in an action to foreclose a mechanic's lien. The facts of the case are undisputed. They are, that the defendant Pettigrove was in possession of the premises under a contract of purchase, and made a contract with the plaintiff to repair the building thereon for \$3,286, and gave the plaintiff a mortgage upon certain other land to secure the amount. After the work was done, the plaintiff filed the necessary notice to effect his lien, and then foreclosed his mortgage, and realized from it \$1,025, which he deducted from the contract-price for the repairs.

In this action, the defendant claims that the mortgage must be regarded as payment, or, at all events, a security of a higher nature than the original contract debt, and must be held to extinguish it.

It appears also in this case that there was a judgment entered against the defendant, Pettigrove, in the foreclosure suit, for deficiency for \$2,678.86, and he now claims that as this is a lien upon the premises for the full amount due on the contract, and as the plaintiff has elected to take this personal judgment for the deficiency, the lien must be held to be extinguished.

This last position assumes that the judgment is a lien on this land, which is not true, as the defendant has not the title.

The judgment in this action to foreclose the mechanic's lien gives more power and greater rights than a simple money judgment, and we think he is entitled to pursue all the remedies he has until he realizes his claim.

Judgment affirmed, with costs.

Present — DYKMAN and PRATT, JJ. BARNARD, P. J., not sitting.

Judgment affirmed, with costs.

MEMORANDUM  
OF  
A CASE NOT REPORTED IN FULL.

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WILLIAM S. VERPLANCK AND OTHERS, EXECUTORS, ETC., OF  
JOHN. P. DE WENT, DECEASED, RESPONDENTS, v. ADELE  
DE WENT AND OTHERS, APPELLANTS.

10h 611  
e 39 Mis 625

*Construction of will—advancement—when interest commences to run on.*

APPEAL from a judgment entered upon the trial of this action at the Special Term.

The action was brought to obtain the construction of a will.

The court at General Term said: "We see no reason for disturbing the judgment at Special Term. The eighth clause of the will gives to Francis A. De Went, the testator's son, one equal share or tenth part of his estate. The ninth clause charges him with an advancement of \$5,000, 'to go in diminution' of his share.

The first codicil provides that Francis A. De Went having died, that said tenth part 'shall be held in trust by the executors,' and the income of 'this share' be used for the benefit of his widow and children, until they shall arrive at twenty-one, and then to pay over 'said one-tenth part' to said children as they arrive at the age of twenty-one. The intention of the testator is manifest. He desired simply to bequeath the share Francis would have received by his will, viz.: one-tenth part, less the \$5,000 advancement, in trust for the benefit of his widow and children.

There is no inconsistency between the will and the codicil upon the construction given to it by the judgment below. Any other construction would be forced and unnatural, and would make an inconsistency where none exists.

The advancement, by the ninth clause of the will, is to go in

diminution of the respective shares 'on the settlement of my estate.'

This must be held to mean, when my death and the probate of my will places my estate in a position of settlement.

The advancement bears interest from the time of the probate of the will. Unless specially directed by the will, advancements do not bear interest, during the life of the testator, from the time of the making of the advancement. But in charging the advancement, it is just as though the testator had said: 'A legatee under my will owes my estate so many dollars, and it is to be collected out of his legacy, together with interest thereon from the probate of my will.' It stands upon the same footing as any other debt due the estate; the time the debt is due being fixed as the day the will takes effect, its collection being deferred to the date of distribution of the legatee's share. It forms a portion of the assets of the estate, and the legatee receiving his share of it upon the distribution of his share.

The judgment must be affirmed."

*L. Hoyt*, for the appellants. *C. Wheaton*, for the respondents.

Opinion by PRATT, J.

Present -- BARNARD, P. J., PRATT and DYKMAN, JJ.

Order affirmed, with costs and disbursements.

# INDEX.

	PAGE.
<b>ABANDONMENT</b> — <i>Acceptance—under a marine policy—on the freight.</i>	
1. A policy provided, that "no claim for total loss shall be made * * * except in the case of, * * * an actual or technical loss of the vessel under the policies of insurance on her" (vessel and cargo). The vessel was wrecked at a short distance from her port of destination and both vessel and cargo abandoned to the underwriters, including the defendant, who took possession of the ship and succeeded in transporting a portion of the cargo to the said port, where it was sold and the proceeds arising therefrom distributed among them. An abandonment of the freight was also made, but the same was not accepted by the defendant. <i>Held</i> , that the plaintiff had the right to abandon the freight, and that the defendant was liable under the policy for a total loss thereof, and that his right so to do was not affected by the fact that the underwriters succeeded in transporting a portion of the cargo to the port of destination and there disposing of the same.	
HUBBELL v. GREAT WESTERN INS. CO. ....	167
2. — <i>Total loss.</i> ] Where an abandonment has been accepted, the question as to whether or not the loss was total is no longer an open one, but where it has not been accepted, the insured must establish by satisfactory proof a state of facts clearly showing his right to abandon. <i>Id.</i>	
<b>ACCEPTANCE</b> — <i>Right of abandonment, under policy of marine insurance, of vessel, cargo, freight—acceptance of—effect of.</i>	
See HUBBELL v. GREAT WESTERN INS. CO. ....	167
— <i>Where goods are delivered prior to the time contracted for by the purchaser, they are at shipper's risk until accepted by such purchaser.</i>	
See CORRIGAN v. SHEFFIELD .....	227
— <i>By plaintiff of admissions or averment in answer, must be of the whole—he cannot accept a portion and reject the remainder.</i>	
See GOODYEAR v. DE LA VERGNE .....	587
<b>ACCIDENTS</b> — <i>In streets—liability of municipal corporation for—what precautions are required to guard against.</i>	
See SHEAR v. VAN DYKE .....	528
<b>ACCOUNTING</b> — <i>Application for an accounting by executors and trustees, under 2 R. S., 92, § 52, may be made by one co-trustee—Power of surrogate of New York to order a reference to take such account—Chap 859 of 1870, § 6.</i>	
See BUCHAN v. RINTOUL .....	188
— <i>By administrator—next of kin must be parties to—Statute of limitations—how interposed in such proceedings.</i>	
See CLOCK v. CHADEAGNE .....	97
— <i>Judgment on—Assumption of outstanding claim, operates as a transfer of it—Evidence.</i>	
See VAIL v. TUTTILL .....	81
<b>ACTION</b> — <i>For use and occupation, under reservation of right of way in lease.</i>	
See FORTH v. HARTNETT .....	573
— <i>For deficiency on mortgage foreclosure—after judgment of foreclosure and sale—leave of court to maintain—when necessary.</i>	
See SCOFFIELD v. DOSCHER .....	582
— <i>When maintainable for services rendered by one member of a family to another.</i>	
See MARKEY v. BREWSTER .....	16

**ACTION — Continued.**

PAGE.

- *To recover assets of bankrupt — in what court it must be brought — Jurisdiction of State court — Jurisdiction of United States court, when exclusive — § 2 of chap. 890 of act of Congress of 1874.*  
*See OLCOTT v. MACLEAN* ..... 277
- *Against receiver for money collected — by a person not a party to the action in which the receiver was appointed.*  
*See SHERIDAN v. JACKSON* ..... 89
- *To set off judgment — effect of prior assignment of judgment — Distinction between proceeding by motion and action.*  
*See PROUTY v. SWIFT* ..... 232
- *Discontinuance of — on ground that it has been settled — what must be shown upon application for.*  
*See CONNORS v. TITUS* ..... 235
- *When maintainable against heir at law of deceased grantor, for breach of covenant.*  
*See ARMSTRONG v. WING* ..... 520
- *By judgment creditor against assignee in bankruptcy, to recover value of property levied on by sheriff, under execution against judgment creditor, and by the sheriff delivered to assignee.*  
*See ANSONIA BRASS AND COPPER CO. v. PRATT* ..... 443
- *Of replevin — judgment in — liability of sureties upon undertaking given in — cannot be sued upon until execution has been returned unsatisfied.*  
*See HAGER v. CLUTE* ..... 447
- *For professional services — unliquidated demand — interest cannot be allowed upon the amount of the recovery from the time of the rendition of the services.*  
*See GALLUP v. PERUE* ..... 525
- *Removal of, to United States Courts under chap. 137 of 1875 — averments in petition not binding upon court.*  
*See CLARK v. OPDYKE* ..... 383

**ADJOURNMENT** — *Supplementary proceedings.*] A judge or referee in supplementary proceedings has the power of adjournment the same as a master in chancery had when acting under an order for the examination of a debtor in a creditor's suit, and he may adjourn the proceedings from time to time, even though the debtor to be examined refuses to consent thereto.

*KAUFMAN v. THRASHER* ..... 438

**ADMINISTRATORS:**

*See EXECUTORS AND ADMINISTRATORS.*

**ADMISSIONS** — *Contained in answer — acceptance of, by plaintiff.*] Where, upon the trial of an action, a plaintiff desires to avail himself of an admission or averment contained in an answer, he must accept the admission or averment as an entirety; he cannot accept a portion of such admission or averment and reject the remainder. *GOODYEAR v. DE LA VERGNE*.... 537

— *Of devisees under will — when admissible in evidence on probate of will.*

*See HORN v. PULLMAN* ..... 471

**ADVANCEMENT.** — *When interest commences to run on.*

*See VERPLANCK v. DE WENT* ..... 611

**ADVERTISING** — *City of Troy.*] Notice of sale of property for non-payment of taxes is city advertising within the express language of the charter, and although the charter requires the chamberlain to publish such notices in two of the official papers, yet this does not affect the right of the common council to direct their publication in two other official papers.

*FRANCIS v. CITY OF TROY* ..... 515

**AFFIDAVITS** — *Not served — right of moving party to read them on motion.*

*See JACOBS v. MILLER* ..... 230

— *Sufficiency of, to procure summons in a summary proceeding.*

*See PEOPLE EX REL. HUGHES v. LAMB* ..... 343

**AGENT**—*Of insurance company—powers of—when company bound by acts of—waiver of conditions of policy.*

See *VAN ALLEN v. FARMERS' JOINT STOCK INSURANCE COMPANY*.... 397

—*Commissioners of highways, not of town.*

See *PEOPLE EX REL. VAN KEUREN v. AUDITOR*..... 551

**ALIMONY**—*What amount allowed.*] 1. Upon an application by a wife for a divorce, the court will not, as a rule, award to her, for alimony, more than one-third of her husband's entire estate.

Although, upon an application for temporary alimony the court may, when but a short time intervenes between the application therefor and the order granting the same, direct that it be paid from the time the application was made, yet when the interval is a long one, *e. g.*, seven years, during which time the wife has succeeded in supporting herself, alimony should only be allowed from the date of the order. *COLLINS v. COLLINS*..... 273

2. — *Appeal.*] Upon an appeal from an order granting temporary alimony in an action for a divorce, the General Term has power to modify the order by reducing the amount allowed thereby. *Id.*

**ALLEY-WAY**—*When included in demised premises—Curtilage—Statement of landlord as to premises demised.*

See *PEOPLE EX REL. MURPHY v. GEDNEY*..... 151

**ALLOWANCES**—*Power of surrogate to make—limited to the successful party—2 R. S., 228, § 10—chap. 359 of 1870, § 9.*

See *NOYES v. CHILDREN'S AID SOCIETY*..... 299

**AMENDMENT**—*To pleadings.*] 1. After issue joined, in an action brought to recover the possession of personal property, the plaintiff died, and thereafter the action was revived in the name of his widow, as executrix. Upon the trial, it appeared that the husband had no title to the property, but that the same was owned by the wife in her own right. *Held*, that the court had no power to amend the summons and complaint by striking out the word "executrix," and thus allow the plaintiff to recover by virtue of her own title to the property. *PHILLIPS v. MELVILLE*..... 211

2. — *To answer, setting up usury—allowance of—Character of defense not considered.*] In allowing amendments to answers, the court does not now regard the character of the defense sought to be interposed. Accordingly, *held*, that an order allowing an answer to be amended by setting up the defense of usury was properly granted, and should be affirmed.

*BARNETT v. MEYER*..... 109

**ANIMALS**—*When ferocious—liability of owner for injuries occasioned by.*

See *MULLER v. MCKESSON*..... 44

**ANSWER**—*Amendment to, setting up usury—allowance of—character of defense not considered.*

See *BARNETT v. MEYER*..... 109

— *Admissions contained in—acceptance of by plaintiff—must accept the admission of an averment as an entirety—he cannot accept a portion of such admission or averment, and reject the remainder.*

See *GOODYER v. DE LA VERGNE*..... 587

**ANTE-NUPTIAL AGREEMENT**—*Release of dower by wife—consideration required to sustain it.*] 1. An ante-nuptial contract of a woman that she will not claim her dower in the event of her intended marriage is contrary to public policy, and unless founded upon the consideration of some provision for her in lieu of dower, will be ineffectual both at law and in equity.

*CURRY v. CURRY*..... 866

2. — *Chap. 875 of 1849.*] This rule is not changed by chapter 875 of 1849, providing that all contracts made between persons in contemplation of marriage, shall remain in full force after such marriage takes place. *Id.*

3. — *Marriage—not sufficient consideration.*] Such intended marriage, even though solemnized in reliance upon the agreement, does not of itself furnish a sufficient consideration to support the same.

**ANTE-NUPTIAL AGREEMENT—Continued.**

PAGE.

*Quære*, as to the power of the court to inquire into the adequacy of the provision made for the wife, and as to the extent to which such inquiry can be carried. *Id.*

**APPEAL**—*Need not be taken from an interlocutory judgment or decree—but a motion may be made for a new trial, on a case and exceptions, under section 268 of the Code—when.*

*See* BENNETT v. AUSTIN..... 451

—*From allowance of alimony.*] Upon an appeal from an order granting temporary alimony in an action for a divorce, the General Term has power to modify the order by reducing the amount allowed thereby.

*COLLINS v. COLLINS*..... 272

—*From chamber order of county judge—can only be taken after order has been entered in the county clerk's office.*

*See* POOL v. SAFFORD..... 497

**ARCHITECT**—*Services of, in superintending the erection of a house—do not come within the term "labor," as used in the mechanic's lien law, chapter 478 of 1862, and he is not entitled to a lien for such services.*

*See* STREYKER v. CASSIDY..... 18

**ASSESSMENT**—*For local improvement—notice to parties affected by—when required.*] 1. Where an act of the legislature requires the expenses of a local improvement to be assessed upon the property benefited, no notice of the time and place at which the assessors will meet to hear persons to be affected thereby, nor of the completion of the assessment, is required to be given, unless required by the terms of the act itself. *STUART v. PALMER*..... 23

2. —*For taxation—what property subject to—extent of the State authority over regulation of commerce with foreign States—duties on imports and exports.*] Upon an application by the relator to procure a review of an assessment of his personal estate made by the respondent, he set forth that his personal estate amounted to about \$125,000, which was "continuously employed in the business of exporting cotton from the United States to foreign countries." Such employment consisting in purchasing cotton in different States and exporting the same, and that as much as "\$115,000 was continuously invested in cotton of the growth of the United States, which had been cleared at a custom-house, and was on shipboard in course of exportation to some foreign State or country."

*Held*, (1) that the imposition of a tax upon the relator's capital in said business was not a violation of article 1, section 8, subdivision 3 of the United States Constitution, declaring that congress shall have power to regulate commerce with foreign nations and among the several States.

(2) That it was not a violation of article 1, section 10, subdivision 2, prohibiting any State, without the consent of congress, from laying any impost or duties on imports or exports; and,

(3) That it was not a violation of article 1, section 9, subdivision 5, providing that no tax or duty shall be laid on articles exported from any State. *PEOPLE EX REL. HANEMAN v. TAX COMMISSIONERS*..... 255

3. —*In New York—vacating of—failure of city authorities to designate corporation paper—duty of clerks of common council, as to publication.*] Where, upon an application to vacate an assessment in the city of New York, it appeared that, at the time of the passage of the ordinance directing the work to be performed, there were no newspapers lawfully designated by the city authorities in which to publish municipal proceedings, though the law required that such designation should be made, *held*, that as the law required the clerks of the boards of aldermen to publish such resolutions and ordinances, they could, in case the city authorities neglected to designate any corporation papers, publish the same in any newspaper published in the said city. *MATTER OF DURKIN*..... 269

4. —*In city of New York—valuation by ward assessors—§ 7, chap. 326 of 1840—Irrregularity in laying assessment—corrected under § 27, chap. 383, 1870.*] It is a sufficient compliance with the requirements of section 7 of chapter 326 of 1840—providing that the commissioners or assessors for making esti-



**ASSESSMENT** — *Continued.*

PAGE.

mates and assessments for any improvements in the city of New York, authorized by law to be assessed upon the owners and occupants of houses and lots shall, in no case, assess any house or lot for more than one-half the value of the same, as valued by the ward assessors in which the same is situated — that such house or lot has been valued by the ward assessors at any time previous to the imposition of the assessment.

Accordingly, *held*, that where the property of the petitioners had been valued by the ward assessors in the years 1854, 1855 and 1856, an assessment might be imposed thereon in the year 1860, though no valuation had been placed thereon after 1856.

An assessment, exceeding in amount one-half of the value placed upon the property by the ward assessors, is irregular only, and may be corrected under section 27 of chapter 888 of 1870. **MATTER OF HEBREW ASYLUM** . . . 112

— *Of damages on property benefited — measure of — chap. 287 of 1874 — Constitutionality of — Right of eminent domain — notice to persons affected by exercise of.*

*See* LONG ISLAND R. R. CO. *v.* BENNETT . . . . . 91  
*See* MUNICIPAL CORPORATION.

**ASSIGNMENT** — *Of claim.*] One partner, by charging himself on an accounting with his copartner, with having received the amount of a partnership claim against a third person, becomes the owner of such claim in his individual right. **VAIL *v.* TUTHILL** . . . . . 31

— *Of interest in an award, on widening and straightening Broadway, New York city, under chap. 890 of 1869 — when trust created thereby — successive assignments — notice.*

*See* SPEARS *v.* MAYOR . . . . . 160

— *Of portion of an indivisible claim — effect of.*

*See* MULFORD *v.* HODGES . . . . . 79

— *Presumption of payment — cancellation of — power of court over — parties to application for.* **MATTER OF STRIKER** . . . . . 308

**ASSIGNEE** — *Of factor selling under del credere commission — rights of.*

*See* FRANKLYN *v.* SPRAGUE . . . . . 589

**ATTACHMENT** — *Effect of, on bankruptcy proceedings — liability of one paying over money to sheriff under.*

*See* DUFFIELD *v.* HORTON . . . . . 140

— *Effect of adjudication of bankruptcy on.*

*See* BREWERS AND MALTSTERS' INS. CO. *v.* DAVENPORT . . . . . 264

**ATTORNEY** — *liability of, for malpractice.*] 1. On the 10th of March, 1873, the plaintiff employed defendants to procure a divorce for her from her husband, and agreed to and did pay \$1,500, at once, to defray expenses to be incurred by them in proceeding to Berlin to ascertain facts upon which to frame a complaint, and agreed to pay the further sum of \$2,000 in case the divorce was obtained in three months from the date of the agreement. An order was procured in the action for the service of the summons by publication, on the ground of the non-residence of the plaintiff's husband. On the 2d of June, 1873, a final decree for divorce was obtained, and the plaintiff, on the 4th of June, paid to the defendants the \$2,000, and some few weeks thereafter she remarried.

In August following, the husband applied to have the divorce vacated, and subsequently an order was made allowing him to come in and defend the action on account of gross irregularities committed by the defendants in obtaining the judgment. In this action, brought by the plaintiff to recover the moneys paid under the agreement and damages for malpractice, *held*, (1) that as the plaintiff had paid the money in ignorance of the fact that the judgment had been irregularly obtained, she was entitled to recover the same; (2) that as the judgment had been opened on account of the ignorance and negligence of the defendants, she was entitled to recover the damages sustained by her in consequence thereof. **VON WALLHOFFEN *v.* NEWCOMBE** . . . 236

**ATTORNEY** — *Continued.*

PAGE.

2. — *Claim for services against four jointly — assignment of claim against two of them only.*] Where an attorney appeared and defended an action for four defendants, and subsequently assigned his claim therefor against two of them and this assignee brought an action therefor against them, *held*, that the claim was an indivisible one. That the assignment to the plaintiff did not assign the whole claim to him, and the claim being indivisible did not vest him with any separate part thereof. *MULFORD v. HODGES*..... 79

— *Action by, for services — defense that charges are exorbitant and oppressive — reference not usually ordered in such cases.*

See *MARTIN v. WINDSOR HOTEL CO.*..... 304

— *Unliquidated demand for professional services — allowance of interest upon — statute fee bill — not conclusive as to their value.*

See *GALLUP v. PERUE*..... 525

**AWARD** — *Assignment of interest in, on widening and straightening Broadway, New York city — chap. 890 of 1869 — when trust created thereby — successive assignments thereof — notice*

See *SPEARS v. MAYOR*..... 160

**BAILEMENT** — *Loan of articles for a specific purpose — liability of borrower, if they are used for other purposes — burden of proof as to cause of injuries.*

See *BUCHANAN v. SMITH*..... 474

**BANKRUPTCY** — *Assignee in — action to recover assets of bankrupt — in what court it must be brought — jurisdiction of State court — of United States District Court, when exclusive — § 2 of chap. 890 of act of congress of 1874.*

1. By section 2 of chapter 890, of the act of congress of 1874, providing "that the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt \* \* \* shall, when such debt does not exceed \$500, be collected in the courts of the State where such bankrupt resides," the United States District Court is vested with exclusive jurisdiction over all actions brought by an assignee to recover property alleged to have been transferred by the bankrupt in violation of section 5128 of the United States Revised Statutes, where the value of such property is greater than \$500. *OLOOTT v. MACLEAN*..... 277

2. — § 2, *chap. 890, of 1874.*] Although prior to the passage of the act of 1874 the State court had concurrent jurisdiction with the United States District Court over such actions, yet by the passage thereof such jurisdiction was withdrawn from it, even as to actions theretofore commenced and then pending therein. *Id.*

3. — *Effect of adjudication in, on attachment — Action of interpleader — of assignee in bankruptcy with creditor of bankrupt — Jurisdiction of State courts over.*] One Davenport, having commenced an action against a corporation created in the State of Missouri, procured an attachment to be issued therein, on the 15th of September, 1873, under which a debt due from the plaintiff to the said corporation was attached. On the 3d of November, 1873, Davenport recovered judgment in the said action and issued execution thereon. On the second of October a petition in bankruptcy was filed against the corporation in Missouri, and on the eighth of November it was duly declared bankrupt.

Davenport and the assignee in bankruptcy each claiming the money, the plaintiff brought this action, praying that the court would decide which of the two were entitled to receive the same. *Held*, that as the attachment was issued within four months of the filing of the petition, it was annulled by the subsequent adjudication, and that the assignee was entitled to the money.

*Held*, further, that this was not an action to recover assets belonging to the estate of the bankrupt within the meaning of the amendment of the bankruptcy act of 1874, depriving the State courts of jurisdiction over such action, but was brought to secure a decision binding on the contesting claimants, declaring to which of them the debt could lawfully be paid, and that this court had jurisdiction over the same.

*BREWERS and MALTSTERS' INS. CO. v. DAVENPORT*..... 264

4. — *Effect of, on attachment — liability of one paying over money to sheriff under.*] An assignment to an assignee, duly appointed, in proceedings under

**BANKRUPTCY — Continued.**

PAGE.

the bankrupt act, dissolves the lien of an attachment issued out of a State court, where the property of the bankrupt has been levied upon within four months of the commencement of such proceedings.

Where, in such a case, the person owing to the bankrupt the money levied upon under the attachment delivers the same to the sheriff upon an execution issued upon a judgment recovered in said action, not knowing that an assignee in bankruptcy had been appointed after the attachment and before the judgment, he is liable to such assignee for the value of the property so delivered. *DUFFIELD v. HORTON*..... 140

5. — *Act of 1867 — when State insolvent law suspended by.*] The bankruptcy act of March 2, 1867, did not take effect so as to suspend the operation of the insolvent law of this State until June 1, 1867. *AUGSBURY v. CROSSMAN*.. 389

6. — *Petition for discharge under State law — relinquishment by petitioning judgment creditor, of the security for his debt — form of.*] A petition, for the discharge of a debtor under the State insolvent law, was signed by a judgment creditor, who indorsed thereon: "For value received I hereby release to the assignee to be appointed, all claims on the estate of Charles Crossman, that I have by reason of the judgment against him assigned to me." *Held*, that this was a sufficient compliance with the provision of 2 Revised Statutes, 36, section 11, requiring any secured creditor, who signs the application, to add to his signature a declaration in writing relinquishing his security for the benefit of all the creditors of the debtor. *Id.*

7. — *Application for discharge — within what time it must be made — sec. 29 of bankrupt act.*] Under section 29 of the original bankrupt act, providing that "at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts," *held*, that the requirement that the application should be made within one year from the adjudication of bankruptcy, applied only to those cases in which no debts were proved, or no assets had come to the hands of the assignee.

*WOOD v. HAZEN*..... 362

8. — *Assignee in — action by judgment creditor against, to recover value of property levied on by sheriff and delivered to assignee.*] On the 23d of June, 1878, plaintiff obtained a judgment against one Frink, and on the twenty-sixth issued an execution thereon to the sheriff, by whom a levy was made on personal property sufficient to satisfy the same. Frink having been adjudged a bankrupt in the following August, a marshal, under an order of the bankrupt court, demanded of, and received from the sheriff possession of the said property, and subsequently delivered the same to the defendant, Frink's assignee in bankruptcy. In an action by the plaintiff to recover the value of the property, *held*, (1) that the action could not be maintained as for a wrongful taking and conversion of the property, as the plaintiff acquired by the levy no sufficient title to or interest in the same to sustain such an action; (2) that it could not be maintained as an enforcement of an equitable lien, acquired by the plaintiff by virtue of his judgment, on the fund in the hands of the assignee, for the reason that the bankruptcy court alone had jurisdiction over an action of such a character.

*ANSONIA BRASS AND COPPER CO. v. PRATT*..... 448

— *Of debtor — effect of, on running of statute of limitations.*

*See VON SACHS v. KRETZ*..... 95

— *Act section 28 — Within what time application for discharge of bankrupt must be made.*

*See WOOD v. HAZEN*..... 362

**BILL OF EXCHANGE — Want of consideration — when it may be shown.]**

1. In an action upon a bill of exchange against the drawer thereof, the latter may defeat the action by showing that there was no consideration therefor; except when it has passed into the hands of a *bona fide* holder for value before maturity. *McCULLOCH v. HOFFMAN*..... 183

2. — *What evidence proper to establish it.*] Where such defense is inter-

**BILL OF EXCHANGE**—*Continued.*

PAGE.

posed, the defendant may show all that occurred at the time of the making of the bill, not to limit its effect or change its character, but to establish the absence of any consideration and the knowledge of the plaintiff of that fact. *Id.*

**BOARD OF HEALTH**—*Of Syracuse—power of, to appoint inspector of milk—destruction of impure milk.*] The board of health of the city of Syracuse appointed an inspector of milk, and authorized him to seize and examine all offered for sale in that city, upon having reasonable cause to believe that the same was below the standard quality of pure and wholesome milk, and to destroy the same if proved by him to be below such standard.

In an action to recover the value of milk so seized and destroyed, *held*, that the board of health had power to pass such ordinance, and that the inspector of milk was protected thereby while acting thereunder.

**BLAZIER v. MILLER**..... 485

**BOILER AND ENGINE**—*When they remain personal property after annexation to realty—chattel mortgage on—effect of giving.*

*See* **SISSON v. HIBBARD**..... 420

**BONA FIDE PURCHASER**—*Unrecorded deed.*] Where the plaintiff, at the time of his purchase, knew that a former deed had been given and lost, but did not know its contents, and the only consideration given by him on the purchase is a mortgage not yet due, and with no personal covenant on his part, the lost deed having afterwards been found and recorded, *held*, that the deed to the plaintiff was not entitled to priority over the first mentioned deed, for the reason that he was not a *bona fide* purchaser under his deed, the only consideration therefor being a mortgage not yet due.

**SCHROEDER v. GURNEY**..... 413

— *New York city—opening of Broadway in—chap. 890 of 1869—assignment of interest in an award—when trust created by—successive assignments—Notice.*

*See* **SPEARS v. MAYOR**..... 160

— *Of a new note substituted for an old one which was usurious—rights of.*

*See* **SHEERWOOD v. ARCHER**..... 73

— *Of bonds issued by railroad company—alleged fraudulent statements in bonds—what facts sufficient to put upon inquiry.*

*See* **CAYLUS v. N. Y., K. AND S. R. R. Co.**..... 295

— *Mortgages in mortgage for existing debt, is not.*

*See* **VAN SLYCK v. NEWTON**..... 554

**BONDS**—*Issued by railroad company—alleged fraudulent statements in—Bona fide purchaser—what facts sufficient to put upon inquiry.*

*See* **CAYLUS v. N. Y., K. AND S. R. R. Co.**..... 295

**BORROWER**—*Liability of, for articles loaned for a specific purpose, if they are used for other purposes—burden of proof, in case of injury to articles, as to cause thereof.*

*See* **BUCHANAN v. SMITH**..... 474

**BREACH OF COVENANT**—*When action for, maintainable against heir at law of deceased grantor.*

*See* **ARMSTRONG v. WING**..... 530

**BROADWAY (NEW YORK CITY)**—*Opening of—chap. 890 of 1869.*] 1. In proceedings instituted under chapter 890 of 1869, to widen and straighten Broadway, an award of \$40,000 was made to the defendant Thompson as the owner of a leasehold interest in several lots taken by the commissioners, and confirmed by the court December 28, 1870. On December 31, 1870, Thompson, by an instrument in writing, sold and transferred to the plaintiff's assignor \$12,262 out of the said award, and covenanted therein that an award, exceeding in amount \$12,262, had been made to him by the commissioners and confirmed by the court; that there were no liens thereon; that he had

**BROADWAY (NEW YORK CITY)—Continued.**

PAGE.

done and would do nothing to prevent the collection of said amount, and authorized said assignee to demand, receive and receipt for the said sum, and also authorized the comptroller or chamberlain of the city to pay the same.

**SPEARS v. MAYOR** ..... 160

2. — *Assignment of interest in an award—when trust created by.*] Subsequently the Special Term of the Supreme Court, under chapter 57 of 1871, vacated and set aside the said report, and appointed new commissioners to make a new assessment, both as to awards for damages and appraisements for benefits. In these proceedings an award was made to Thompson of \$11,544, which was subsequently confirmed by the court. *Held*, that the assignment, with the covenants therein contained, created between Thompson and his assignee, the relations and all the obligations of a trust which a court of equity would enforce upon any specific award of damages which might be made for Thompson's leasehold interest in the premises, even though the award referred to and described in the assignment had been set aside. *Id.*

8. — *Successive assignments—Notice.*] On the 11th of January, 1871, and prior to the setting aside of the \$40,000 award, Thompson executed a mortgage to one M. upon the lease and leasehold premises taken for said widening, for \$12,850 and interest, which said mortgage was duly recorded, and at the same time assigned the said sum of \$12,850 out of the \$40,000 award. At the time of taking the mortgage M. had knowledge of the prior assignment. *Held*, that the claims of the first assignee upon the amount finally awarded were superior to those of one claiming under the mortgage and assignment to M. *Id.*

**BURDEN OF PROOF**—*As to cause of injury to articles loaned, when articles are not used for purpose for which loan was made.*

*See* **BUCHANAN v. SMITH** ..... 474

**BUSINESS**—*Covenants in restraint of—in action upon, plaintiff must show that the covenant was founded upon a valuable consideration.*

*See* **WELLER v. HERSEE** ..... 481

**CERTIFICATE**—*Of service of summons in summary proceedings.*] 1. A certificate of a constable, showing a service of the summons upon the defendant personally, by showing the original and delivering a copy thereof to him, is "due proofs" of the service thereof. **PEOPLE EX REL. HUGHES v. LAMB**, 848

2. — *Error in, of engineer, as to price.*] The plaintiff's assignor entered into a contract with the trustees of the town of Morrisania, by which he was to receive fifty cents per yard for all filling made thereunder; subsequently the engineer gave a certificate in which the price was stated at seventy-five cents per yard, and certificates of indebtedness for the amounts of the bills so certified were issued by the board of trustees of the said town. *Held*, that as the engineer and trustees were only the agents of the corporation, it was not bound by their unauthorized acts, and that the payment could not, therefore, be regarded as a voluntary one.

**DONOHUE v. MAYOR** ..... 87

— *Of mortgages, on sale of mortgage to third parties—when it operates as an estoppel to plea of usury.*

*See* **NICHOLS v. NUSSEBAUM** ..... 214

**CERTIORARI**—*Board of police commissioners of New York—trial before.*

*See* **PEOPLE EX REL. SKAHAN v. POLICE COMMISSIONERS** ..... 106

**CHAMBER ORDER**—*Of county judge—appeal from—can only be taken after order has been entered in the county clerk's office.*

*See* **POOL v. SAFFORD** ..... 497

**CHARACTER**—*Testimony of witness, as to general reputation—what questions may be asked.*

*See* **CARPENTER v. BLAKE** ..... 858

**CHARTER-PARTY**—*Tonnage of vessel given in—when not conclusive.*

*See* **DOLZ v. MORRIS** ..... 201

	PAGE.
<b>CHATTEL MORTGAGE</b> — <i>certified copy of — admissible as evidence of the date of filing, but not of the existence and execution of the mortgage.</i>	
<i>See SUNDERLIN v. WYMAN</i> .....	493
— <i>On personal property — annexation to realty — effect of.</i>	
<i>See SIBSON v. HIBBARD</i> .....	420
<b>CHECK</b> — <i>When money in bank bound by.</i> ] Where a check was drawn by an insurance company in settlement of a loss, but the money was withdrawn by the receiver of such company before presentation thereof, <i>held</i> , that the holder was entitled to have the amount of such check paid by the receiver out of the funds so withdrawn. <i>MERRILL v. ANDERSON</i> .....	604
<b>CLIENT:</b>	
<i>See ATTORNEY AND CLIENT.</i>	
<b>CLUBS</b> — <i>Liability of members of — how terminated.</i> ] Where a body of gentlemen join themselves together for social and recreative purposes, and assume a name under which they incur liabilities, the members thereof become jointly liable for any indebtedness thus incurred, and each member continues liable so long as he remains a member of such body, and until he notifies the creditors thereof of his withdrawal therefrom.	
<i>PARK v. SPAULDING</i> .....	128
<b>CODE</b> — § 110 — <i>Requiring an acknowledgment or promise "to be in writing" to take a claim out of the statute of limitations.</i> ] This section was designed to introduce no new principle applicable to reviving stale demands, but solely to prevent the revival of such demands by loose oral declarations.	
<i>KINCAID v. ARCHIBALD</i> .....	9
— § 118 — <i>The committee of the person and estate of a lunatic is not the trustee of an express trust within the meaning of.</i>	
<i>See BURNETT v. BOOKSTAVEN</i> .....	481
— § 124 — <i>Venue — right of sheriff to change it to his county.</i> ] In an action against the sheriff and attaching creditors, praying that they be compelled to determine their conflicting claims to property attached, <i>held</i> , upon the application of the sheriff, that he was entitled under section 124 of the Code to have the place of trial changed to his county. <i>WINTJEN v. VERGES</i> .....	576
— § 171 — <i>When pleadings cannot be amended upon the trial under.</i>	
<i>See PHILLIPS v. MELVILLE</i> .....	211
— § 288 — <i>The giving by non-residents of the bond of indemnity required by — does not relieve them from giving security for costs as required by part 3, chap. 10, title 2, section 1, of the Revised Statutes.</i>	
<i>See HODGES v. PORTER</i> .....	244
— § 268 — <i>Motion for new trial — interlocutory judgment.</i> ] After the entry of an interlocutory judgment or decree, not authorizing a final judgment, but directing further proceedings before a referee or otherwise, a motion for a new trial, on a case and exceptions, may be made under section 268 of the Code, without taking any appeal from such judgment or decree.	
<i>Semble</i> — Such motion cannot be made in case of a trial before a referee.	
Such motion does not stay proceedings under the interlocutory judgment or decree. <i>BENNETT v. AUSTIN</i> .....	451
— § 277 — <i>Replevin — form of verdict and judgment, in action of.</i>	
<i>See PHILLIPS v. MELVILLE</i> .....	211
— § 306 — <i>When one of several defendants entitled to costs.</i> ] Where, in an action brought against several defendants, the plaintiff succeeds as to some and fails as to the others, the successful defendants are only entitled to costs when,	
(1) They are not united in interest with those against whom the plaintiff recovers;	
(2) They have interposed a separate defense by a separate answer; and when,	
(3) Costs are awarded to them by the court. <i>PARK v. SPAULDING</i> .....	128
— § 385 — <i>Costs — accruing after offer of judgment — when action is tried before the expiration of ten days from the offer.</i>	
<i>See HERMAN v. LYONS</i> .....	111

**CODE** — *Continued.*

PAGE

— § 399 — *applies to proceedings under chap. 394 of 1870.*] The inquiry as to the effects of a deceased person authorized by chapter 394 of 1870 is subject to the restrictions of section 399 of the Code, prohibiting the admission of evidence given by parties interested in the proceedings as to personal transactions with deceased. *TILTON v. ORMSBY*..... 7

— § 399 — *Conversation with deceased.*] Although under this section of the Code, a party to an action may testify as to a conversation between the deceased and a third person which he has overheard, so long as such testimony is limited to what was neither a personal transaction nor communication between the witness and the deceased, yet this rule does not prevail when the third person is an agent for, and is acting in the interest of the witness. *HEAD v. TRETER*..... 548

**COMMISSION** — *Examination of witness on — answer to cross-interrogatories — by whom they may be read in evidence.*

*See MARSHALL v. WATERTOWN STEAM ENGINE COMPANY*..... 468

**COMMISSIONER OF HIGHWAYS** — *Order directing removal of encroachment — form of, when signed by only two commissioners.*] 1. Where an order, directing the removal of an encroachment upon a public highway, is signed by only two of the commissioners, it must clearly appear upon the face thereof that all of the commissioners were notified to attend a meeting to deliberate thereon.

The order should contain the words, "all the commissioners," or their equivalent; words that may or may not mean "all" are not enough.

*Quare*, as to what is a sufficient notice of the purpose of the meeting.

*PHILLIPS v. SCHUMACKER*..... 405

2. — *Chapter 432 of 1875 — not a local bill — constitutionality of.*] Chapter 432 of 1875, entitled "An act to confer on boards of supervisors further powers of local legislation and administration, and to regulate the compensation of supervisors," is not a local bill within the meaning of the constitutional provision (art. 3, sec. 16), providing that no private or local bill shall embrace more than one subject, and that shall be expressed in the title; and even if it were so, it embraces but one subject, which is distinctly expressed in its title. *Id.*

3. — *Power of board of supervisors to reduce width of highway.*] Subdivision 10 of section 1 of said act, conferring upon boards of supervisors authority "to authorize the laying out of highways of a less width than is now required by law, and reducing the width of highways now in existence," confers no power upon such boards to adopt a resolution or ordinance which shall have the effect, *proprio vigore*, of establishing such a road or reducing the width of one already in existence, but merely authorizes them to provide, by suitable legislation, for the doing of those acts by commissioners of highways, or such other suitable agencies as the boards may, in their discretion, appoint. *Id.*

4. — *Notice to parties interested.*] Under said act the boards have no power to authorize proceedings in such cases without an application from, or notice to parties interested therein, and without giving such parties an opportunity to be heard. *Id.*

5. — *Proper procedure by supervisors.*] The proper way to exercise the power conferred by the act would be to pass an act authorizing the commissioners of highways of the town, or the other officers or persons designated by the board, to entertain proceedings to reduce the width of the road in question on application and notice as specified in the act. *Id.*

6. — *Not agent of town.*] The relator, an overseer of highways, under the directions of the commissioner of highways of the town of Esopus, removed obstructions from what was claimed to be a highway. Subsequently, one Cole brought a suit against him for trespass, on the ground that the road was not a public highway, but belonged to said Cole, and recovered a judgment for twenty-five dollars. From this judgment relator appealed to the General Term and Court of Appeals, where the judgment was affirmed. No notice of the action or the appeals was given to the town.

**COMMISSIONER OF HIGHWAYS — Continued.**

PAGE

Subsequently, this application was made for a *mandamus* to compel the town to pay the relator \$2,711.47, for the amount of the judgment, and the costs and expenses of the action. *Held*, that he was not entitled to a *mandamus*, (1) because he had failed to give notice to the town of the action or the appeals, and thereby prevented it from taking charge thereof; and (2) because the commissioner of highways was not the agent of the town, and it was not liable for his acts. **PEOPLE EX REL. VAN KEUREN v. AUDITOR..** 551

**COMMITTEE —** *Of estate and person of lunatic — cannot bring action of ejectment.*] 1. The committee of the estate and person of a lunatic cannot bring, in his own name, an action to recover the possession of real property alleged to have belonged to the lunatic prior to his appointment.

Such action must be brought in the name of the lunatic.

**BURNETT v. BOOKSTAVAR.....** 481

2. — *Not trustee of an express trust.*] Such a committee is not the trustee of an express trust, within the meaning of section 118 of the Code of Procedure. *Id.*

**COMMON CARRIER —** *Perishable property — transportation of by railroad company — duty of company as to — receipt for — Value — evidence as to.*

*See* **TIERNEY v. N. Y. C. AND H. R. R. R. Co.....** 569

— *Delivery of goods to wrong person — liability for — distinction between liability of common carrier and warehouseman.*

*See* **SCHUB v. ERIE RAILWAY Co.....** 498

**COMMON COUNCIL —** *Of the city of Troy — powers of, as to city advertising — notices of tax sales.*

*See* **FRANCIS v. CITY OF TROY.....** 515

**COMPLAINT —** *For goods sold — Non-payment of claim — need not be alleged — demurrer.*] A complaint alleging that the plaintiff "sold and delivered to the defendant certain goods of the value, and for which the defendant agreed to pay \$164.68," is sufficient, and it is not necessary to allege that the demand has not been paid, or that it remains due and unpaid at the time of the action. **SALISBURY v. STINSON.....** 242

— *Indefinite allegation as to means profits in — must be objected to before trial.*

*See* **CANDEE v. BURKE.....** 850

— *In action upon a promissory note — need not allege that there was any consideration therefor.*

*See* **UNDERHILL v. PHILLIPS.....** 591

**COMPROMISE —** *Induced by fraudulent representations — remedy of creditor — measure of damages — evidence.*

*See* **WITESIDE v. HYMAN.....** 218

**CONDITION —** *Against incumbrances — in insurance policy on both real and personal property — policy avoided only as to the portion incumbered.*

*See* **MERRILL v. AGRICULTURAL INS. Co.....** 428

**CONDITIONAL DELIVERY —** *Subscription.*] Where a party signed a subscription to the capital stock of a company under an agreement (not expressed on the subscription or in writing) that the subscription was to be void unless certain conditions were complied with — and which conditions were not complied with — the defendant objecting to signing the paper when presented to him, because the conditions were not therein stated, but being informed by plaintiff's agent that it would not be valid until they had been complied with; *held*, that the defendant should be allowed to prove that the paper was signed upon said conditions, and that if he succeeded in so doing he was entitled to a judgment in his favor.

**BREWERS' FIRE INSURANCE Co. v. BURGER.....** 56

**CONDITIONAL SUBSCRIPTION —** *To capital stock of a company — contract — reducing of part to writing — does not preclude oral evidence of the residuum — conditional delivery.*

*See* **BREWERS' FIRE INSURANCE Co. v. BURGER.....** 56



**CONFLICTING CLAIMS** — *To real property.*] Proceedings to determine conflicting claims to real property are maintained by one who is in possession of real property, claiming title thereto. *SCHROEDER v. GURNEY* ..... 418

**CONSIDERATION** — *Promise to pay debt of another — statute of frauds.*] Where a promise is made to answer for the debt, default or miscarriage of another, the consideration thereof must appear either expressly or by necessary implication, in the note or memorandum in writing required by the statute of frauds. *CASTLE v. BEARDSLEY* ..... 343

— *Nature of — required to sustain a covenant in restraint of trade.*  
*See WELLER v. HERSEE* ..... 431

— *Required to sustain release of dower by wife — chap. 875 of 1849.*  
*See CURREY v. CURREY* ..... 366

— *For bill of exchange — want of — when it may be shown what evidence proper to establish it.*  
*See McCULLOCH v. HOFFMAN* ..... 183

— *Promissory note — complaint in action upon — consideration need not be alleged.*  
*See UNDERHILL v. PHILLIPS* ..... 591

**CONSTABLE** — *In Justice's Court — certificate of service of summons in supplementary proceedings by — is due proof of the service.*  
*See PEOPLE ex REL. HUGHES v. LAMB* ..... 348

**CONSTITUTION (U. S.)** — *Art. 1, § 8, subd. 8 — regulating commerce — State taxation on capital employed in business of exporting — validity of.*  
*See PEOPLE ex REL. HANEMAN v. TAX COMMISSIONERS* ..... 255

— *Art. 1, § 9, subd. 5 — prohibiting tax on articles exported from any State — State taxation on capital employed in business of exporting — validity of.*  
*See PEOPLE ex REL. HANEMAN v. TAX COMMISSIONERS* ..... 255

— *Art. 1, § 10 — prohibiting States from laying duties on imports or exports — State taxation on capital employed in business of exporting — validity of.*  
*See PEOPLE ex REL. HANEMAN v. TAX COMMISSIONERS* ..... 255

**CONSTITUTION (N. Y.)** — *chap. 287 of 1874 is constitutional — right of eminent domain — notice to persons affected by exercise of — damages — measure of — assessment of, upon property benefited.*  
*See LONG ISLAND R. R. Co. v. BENNETT* ..... 91

— *Art. 6, § 8 — Supreme Court — general jurisdiction in law and equity — equitable jurisdiction of — extent of.*  
*See YOUNGS v. CARTER* ..... 194

— *Art. 8, § 16 — providing that no private or local bill shall embrace more than one subject, etc. — chapter 482 of 1875, entitled "An act to confer on boards of supervisors further powers of local legislation and administration, and to regulate the compensation of supervisors," is not in conflict with.*  
*See PHILLIPS v. SCHUMAKER* ..... 405

**CONSTRUCTION** — *Of power of attorney.*  
*See CRAIGHEAD v. PETERSON* ..... 596

— *Of will — advancement — when interest commences to run on.*  
*See VERPLANK v. DE WENT* ..... 611

**CONTRACT** — *By public officers — duties of, as to payment — when personally liable thereon.*] 1. The defendants, commissioners appointed under chapter 720 of 1869, were authorized thereby to borrow \$10,000, and, in addition thereto, to issue town bonds, not exceeding \$20,000 per mile, to widen, grade and bridge a highway known as the eastern boulevard, the town authorities being directed to deliver the bonds to them as they might be needed. The plaintiffs contracted with the defendants to build a bridge upon said highway for \$19,864, to be paid in bonds. Upon applying to the commissioners for payment, after the completion of the work, they were informed that all the bonds authorized by the act had been issued to other persons for constructing the highway.

**CONTRACT — Continued.**

PAGE.

In an action by the plaintiffs to charge the defendants personally with the amount due under the contract, *held*, that they were entitled to recover. *Held*, further, that their right to recover was not affected by the facts that the contract was made by the defendants as commissioners and not as individuals, and that it contained a clause providing that they should not be held to any individual liability whatever. *PAULDING v. COOPER*..... 20

2. — *To furnish materials — words "more or less" in — meaning of.*] On the 28th of October, 1873, the plaintiff entered into an agreement with the defendant, whereby he agreed to deliver "2,000 cubic yards of sand \* \* \* more or less," the contract to be duly completed and performed on his part by October 1, 1874. In pursuance of requisitions duly made by defendant's engineer, all bearing date prior to October 1, 1874, materials were delivered thereunder largely in excess of the quantities therein specified. A portion of the materials were delivered after October 1, 1874, but no objection to the reception thereof was made by the defendant either on the ground of delay or as being in excess of the amounts prescribed in the contract.

In an action brought by the plaintiff to recover the contract-price of the materials delivered in pursuance of the contract, the defendant insisted that no recovery could be had for the materials furnished in excess of the quantities specified in the contract. *Held*, that the quantities specified were estimates only, and could be increased by requisitions duly made by the defendant's officers, and that such requisition having been made, and materials delivered, in pursuance thereof, to and accepted by the defendant, it was liable for the price thereof. *HARRINGTON v. MAYOR*..... 248

3. — *Error in certificate of engineer as to price — Voluntary payment — Corporation — not bound by unauthorized payment by agents.*] The plaintiff's assignor entered into a contract with the trustees of the town of Morrisania, by which he was to receive fifty cents per yard for all filling made thereunder. Subsequently the engineer gave a certificate in which the price was stated at seventy-five cents per yard, and certificates of indebtedness for the amounts of the bills so certified were issued by the board of trustees of the said town. *Held*, that as the engineer and trustees were only the agents of the corporation, it was not bound by their unauthorized acts, and that the payment could not therefore be regarded as a voluntary one.

*DONOHUE v. MAYOR*..... 87

4. — *Negotiable certificates of indebtedness — effect of transfer thereof.*] Negotiable certificates of indebtedness were issued to the contractor, who thereafter transferred them to purchasers in good faith. *Held*, that he thereby made himself liable for the value of the certificates so transferred. *Id.*

5. — *When entire — partial delivery under — destruction of property by fire — who must bear loss.*] On the sixteenth of July, defendants, who were paper manufacturers, agreed to purchase of the plaintiff twenty bales of rags, stating, "We should prefer to have them after the first of August, as that is our time for taking account of stock, and we cannot conveniently discount our paper till after that time." On the eighteenth of July plaintiff shipped ten bales to the defendants, stating, by letter not received till after the nineteenth, that they "had to do it to make room," and that they would ship the other ten as ordered. On the morning of the nineteenth of July the ten bales, with other rags, were delivered and received — though without knowledge that they were part of those purchased from plaintiff — at defendants' warehouse. On the afternoon of that day the warehouse took fire, without any fault of the defendants, and the rags were consumed.

In an action to recover the value thereof, *held*, (1) that the contract was an entire one for the delivery of twenty bales; that the ten bales delivered on account thereof remained at plaintiff's risk; (2) that by the contract, the rags were not to be delivered until August first, and that the defendants were not responsible for what might be delivered before that time.

*CORRIGAN v. SHEFFIELD*..... 227

6. — *Acceptance.*] That there was no acceptance of the rags and no opportunity for such examination as defendants had a right to make, before deciding whether to accept or reject them. *Id.*

**CONTRACT — Continued.**

PAGE.

7. — *Agreement to leave property by will.*] Where one person renders services to another in the expectation of receiving a legacy from him, relying solely upon the testator's generosity, there being no contract, either express or implied, that compensation shall be made therefor by will, and the party for whom the services are rendered dies without making such provision, no action will lie in favor of the person rendering the same.

SHAKESPEARE v. MARKHAM..... 311

8. — *Must be certain and definite.*] Where, however, a certain and definite contract to leave property by will is clearly established, and the promisee has fully performed the contract on his part, a court of equity will, in a case free from all objection, either on account of inadequacy of consideration or of other circumstances rendering the claim inequitable, compel a specific performance thereof. *Id.*

9. — *Specific performance.*] Specific performance of such a contract refused in this case, for the reason that the terms and provisions thereof were not sufficiently certain and definite. *Id.*

10. — *Services rendered in expectation of — remedy of party performing.*] Where the contract is too indefinite and uncertain to authorize a decree of specific performance, the remedy of the party who has rendered the services is to bring an action before some tribunal competent to pass upon a disputed claim, to recover the actual value of the services rendered, as upon a *quantum meruit*. *Id.*

11. — *Measure of compensation.*] The measure of damages in a case in which the claimant seeks to recover on an agreement to support and maintain the testator during the term of his natural life, is the amount which the board of the testator, and his nursing during his last illness were reasonably worth, less the value of any services rendered by him. *Id.*

12. *Of sale at purchaser's option, on notice — construction of.*] This action was brought upon a contract for the sale of oil, which was in the following form: "Sold to Mr. T. A. Shaw \* \* \* of account of B., ten thousand (10,000) barrels of crude petroleum \* \* \* oil, to be delivered at buyer's option, at any time from the 24th day of September, 1874, to the 31st day of December, 1874, \* \* \* to be paid for in cash as delivered, with ten days' notice from buyer to seller \* \* \* if no notice is given contract to expire on the 31st day of December, 1874." *Held*, that the meaning of the provision, that if no notice was given the contract was to expire December 31, 1874, was that the right to call for the oil on ten days' notice, and the consequent obligation to deliver it, should end on that day. It was not intended to provide that the obligations of the purchaser should be annulled by a failure to give the notice, and that there should be no remedy thereafter for breaches existing on that day. BUSHNELL v. CHAUTAUQUE CO. NAT. BANK..... 378

13. — *National bank — contract — ultra vires.*] The defendant, a national bank, indorsed upon the back of the contract at the time it was made, that Shaw had on that day deposited in it \$2,500, "to be held by us as collateral security for the faithful performance of the within contract." *Held*,

(1) That it was within the power of the bank to enter into the said contract. (2) That, even if the contract were *ultra vires*, yet as it was not illegal, the defendant was estopped from setting up that defense, as it would be a fraud upon the plaintiff to allow it so to do, he having entered into the contract relying thereon. *Id.*

14. — *Of sale — when title passes.*] Plaintiff and defendants having entered into an agreement for the sale of certain hops by the former to the latter, the same were, in pursuance of the direction of the defendants, delivered to the stationmaster at a designated railroad station, the defendants agreeing to pay for them there. At the time of the delivery the plaintiff instructed the agent to deliver them upon the receipt of the purchase-price thereof. After the hops had been at the station for a few days they were stolen. *Held*, that the title to the hops had passed to the defendants, and that they were liable to the plaintiff for the price thereof. MOREY v. MEDBURY..... 540

— *Agreement to share money overpaid to United States, if recovered — interest thereon, follows principal.*

See BARREY v. LUDINGTON..... 305

**CONTRACT — Continued.**

PAGE.

— <i>Ante-nuptial agreement — release of dower by wife — consideration required to sustain it — chap. 875 of 1849.</i> See <i>CURRY v. CURRY</i> .....	366
— <i>Breach of — measure of damage — Agreement to reside with person in consideration of board, etc. — Sale of furniture made necessary by so doing — loss upon such sale — cannot be recovered in action for breach of contract.</i> See <i>CANDY v. CANDY</i> .....	88
— <i>Divisible and indivisible claims — how distinguished — Assignment of portion of indivisible claim — effect of.</i> See <i>MULFORD v. HODGES</i> .....	79
— <i>Principal and surety — relation between grantor and grantee assuming payment of mortgage — extension of time of payment.</i> See <i>MEYER v. LATHROP</i> .....	66
— <i>Charter-party — Tonnage of vessel given in — not conclusive.</i> See <i>DOLZ v. MORRIS</i> .....	201
— <i>Usury — substitution of new note for old and usurious one — rights of bona fide holder.</i> See <i>SHEERWOOD v. ARCHER</i> .....	73
— <i>Life insurance — written application for — when company cannot take advantage of mistakes in.</i> See <i>TAYLOR v. MUTUAL BENEFIT LIFE INS. CO</i> .....	52
— <i>Effect of agreement of mortgagees to extend time of payment of mortgage — when made with grantee purchasing subject to the mortgage — it does not release mortgagor.</i> See <i>PENFIELD v. GOODRICH</i> .....	41
— <i>Reducing of part to writing — does not preclude oral evidence of the residue — Conditional delivery.</i> See <i>BREWERS' FIRE INS. CO. v. BURGER</i> .....	56
— <i>Clubs — liability of members of — how terminated.</i> See <i>PARK v. SPAULDING</i> .....	128
— <i>Specific performance, when ordered, notwithstanding failure of plaintiff to tender deed.</i> See <i>BUESS v. KOCH</i> .....	299
— <i>In restraint of trade — when it imposes restrictions upon one party which are not beneficial to the other.</i> See <i>WELLER v. HERSEE</i> .....	431
— <i>Promise to answer for debt of another — consideration must appear in note or memorandum — statute of frauds — effect of chapter 464 of 1863 upon.</i> See <i>CASTLE v. BEARDSLEY</i> .....	343
— <i>Policy of insurance on real and personal property — condition as to incumbrances — policy avoided only as to the portion incumbered.</i> See <i>MERRILL v. AGRICULTURAL INS. CO</i> .....	428
— <i>Infancy a defense to — fraudulent representations — when infant liable for — action must be purely for tort.</i> See <i>HEWITT v. WARREN</i> .....	560
— <i>In restraint of trade — in action upon, plaintiff must show that the agreement was founded upon a valuable consideration.</i> See <i>WELLER v. HERSEE</i> .....	431

**CONVERSATIONS** — *Between assured and agent of the company.*] Conversations between an applicant for life insurance and the agent of the insurers are properly admissible in evidence, where the answers of the applicant, filled out to the interrogatories made to him are ambiguous, as to what took place at the time of filling out the answers.

*HIGGINS v. PHOENIX MUT. LIFE INS. CO*..... 459

**CONVEYANCE** — *Subject to mortgage — effect of agreement by mortgagees to extend time of payment.*] Where a mortgagee enters into an agreement with one to whom the property has been conveyed subject to the mortgage, extend-

**CONVEYANCE** — *Continued.*

PAGE.

ing the time of payment thereof, he does not thereby release the mortgagor from his liability upon the bond executed at the time of the giving of the mortgage. *PENFIELD v. GOODRICH*..... 41

— *Relation between grantor and grantee assuming payment of mortgage — extension of time of payment of mortgage — does not release mortgagor.*  
See *MEYER v. LATHROP*..... 66

— *Description in — survey must commence at place of beginning.*  
See *ELLIOTT v. LEWIS*..... 486

**CORPORATION** — *Legal existence of — when party estopped from denying.*]

1. In an action brought by the plaintiff against one Tigney to recover the possession of certain personal property, the defendants, to prevent the delivery thereof to it, gave a bond reciting the plaintiff's claim and binding themselves for the delivery of the property to the plaintiff, if the delivery thereof should be adjudged in said action. In this action brought upon the said bond, after the recovery of a judgment by the plaintiff in the former action and the return unsatisfied of an execution issued thereon, the defendants sought to amend their answer by putting in issue the corporate existence of the plaintiff. *Held*,

(1) That, in the proper exercise of its discretion, the court should deny the application;

(2) That by giving the bond and preventing the delivery of the property to the plaintiff in the former action, the defendants were estopped from denying its legal existence. *LOANERS' BANK v. JACOBY*..... 143

2. — *Liability of trustees of, for failure to file report — right of each creditor to maintain a separate action.*] Under section 12 of chapter 40 of 1843, providing that upon a failure to file the report required by the act, "all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made," each creditor of the company may maintain a separate action to recover the debt due him from the company, and it is not necessary that all the creditors should join in one action. *WILES v. SUYDAM*.... 578

**CORPORATION PAPER** — *New York city — failure of city authorities to designate — duty of clerks of common council, as to publication of municipal proceedings.*

See *MATTER OF DURKIN*..... 269

**COSTS** — *Trial fee — discontinuance of action when reached on the calendar.*]

1. After an action had been noticed for trial and placed upon the calendar, and just as it was about to be moved for trial, an order was entered discontinuing the action upon payment of costs. *Held*, that the defendant was not entitled to include a trial fee in such costs. *SUTPHEN v. LASH*..... 120

2. — *Offer of judgment — costs accruing after.*] After issue had been joined in this action, and on the seventh of February, an offer to allow judgment to be taken against him was served by the defendant; on the ninth of February the cause was regularly called in its order on the calendar, an inquest taken therein, and the costs accruing subsequent to the offer taxed in plaintiff's favor. *Held*, that, as ten days had not elapsed from the service of the offer of judgment to the time of trial, the plaintiff was entitled to disregard the offer and to tax the costs thereafter accruing. *HERMAN v. LYONS*..... 111

3. — *On default against one of two defendants.*] Where a judgment is entered in an action against two defendants, and only one answer, the one who does not defend cannot be charged with the costs incurred by the defense of the other. *HOWK v. BISHOP*..... 509

4. — *Attorney and client — demand for professional services.*] The statute fee bill, although evidence bearing upon the question as to the value and amount of legal services rendered, does not determine the question as between attorney and client. *GALLUP v. PERUE*..... 525

— *Readjustment of — when granted — what directions as to readjustment proper.*

See *MURDOCK v. ADAMS*..... 566

**COSTS** — *Continued.*

PAGE

— *Power of surrogate to allow — limited to the successful party* — 2 R. S., 223, § 10 — *chap.* 359 of 1870, § 9.

See *NOYES v. CHILDREN'S AID SOCIETY*..... 239

— *Security for — in action by non-resident — giving the bond required by Code, § 238, does not relieve from giving security for costs* — R. S., *part* 3, *chap.* 10, *title* 2, § 1.

See *HODGES v. PORTER*..... 244

— *When one of several defendants entitled to — when plaintiff succeeds as to some, and fails as to the other defendants.*

See *PARK v. SPAULDING*..... 128

**COUNTER-CLAIM** — *In an action by assignee in bankruptcy — reply to — by assignee.*

See *VON SACHS v. KRETZ*..... 95

**COUNTY COURT** — *Refunding tax unlawfully collected.*] The County Court has power, under chapter 695 of 1871, upon application of the party aggrieved, to make an order requiring the board of supervisors to refund to such person the amount collected from him, of any tax illegally or improperly assessed or levied, only in cases in which the assessors had no power to make the assessment, and not in cases in which they had power to act but erred in its exercise. *PEOPLE EX REL. HERMANC v. SUPERVISORS*..... 545

— *Allegation as to defendant's residence, where an action is brought in — what sufficient — Allegations in pleadings — relate to time of beginning suit.*

See *BURNS v. O'NEIL*..... 494

— *On nonsuit in — has no power to order exceptions to be first heard at the General Term.*

See *BOYD v. CRONKRITE*.. 574

— *Judge of — when interested, may request judge from another county to hold court.*

See *MATTER OF RYERS*..... 93

**COUNTY JUDGE** — *Chamber order of — appeal from, can only be taken after order has been entered in the county clerk's office.*

See *POOL v. SAFFORD*..... 497

**COURT** — *Of General Sessions of New York city — jurisdiction of — presumption.*

See *MATTER OF JENNINGS*..... 810

**COURTS-MARTIAL** — *Judgments of — review of.*] 1. The legality of a judgment of a court-martial, where such court had jurisdiction and power to render the same, cannot be reviewed upon a *habeas corpus*, issued to procure the discharge of one committed to the county jail by virtue of an execution issued thereon. *PEOPLE EX REL. UNDERHILL v. FULLERTON*..... 63

2. — *Proceedings of, will not be enjoined.*] A court of equity will not restrain, by injunction, a court-martial from trying one, subject to its jurisdiction, where he alleges, as the only ground for such injunction, that he has already been tried upon the same charge, and that he apprehends that the second trial will be unfairly conducted. *PERAULT v. RAND*..... 222

**COVENANTS** — *In restraint of trade.*] In an action by the plaintiffs to recover damages for the breach of a covenant made by the defendant whereby he bound himself not to engage in the business of manufacturing or vending cabinetware in the city of Buffalo or county of Erie, *held*, that it was incumbent upon the plaintiffs to allege facts in their complaint, showing that the covenant was founded upon a valuable consideration.

*Semble*, that the contract is invalid when it imposes restrictions upon one party which are not beneficial to the other. *WELLER v. HERSEE*..... 431

— *For quiet enjoyment in lease — when implied.*

See *PEOPLE EX REL. MURPHY v. GEDNEY*..... 151

**CREDITOR** — *Fraudulent conveyance — remedy of.*] The Supreme Court has no power to effect a transfer of the title to land by directing a sale thereof by its officers, except in special cases authorized by the statutes of

**CREDITOR** — *Continued.*

PAGE.

the State. In suits by creditors to reach lands conveyed with intent to defraud them, the decree should set aside the fraudulent conveyance and permit the creditor to issue an execution thereunder, or compel the debtor to convey to a receiver, and order the latter to sell. *VAN WYCK v. BAKER*. . . . 39

— *Remedy of creditor — on compromise induced by fraudulent representations of debtor — measure of damages — Evidence.*

See *WHITESIDE v. HYMAN* . . . . . 218

— *Of manufacturing corporation — can without joining with the other creditors sue the trustees for his debt, on failure of trustees to file report as required by chap. 40 of 1848.*

See *WILES v. SUYDAM*. . . . . 578

**CRIMINAL LAW** — *Evidence of another distinct crime, for purpose of showing intent — admissibility of.* The plaintiff in error was tried and convicted of petit larceny, the offense having been committed while the complainant was changing a ten dollar bill for him on January 20, 1876. Upon the trial the prosecution was allowed to prove that he had attempted to commit the like crime in the same manner on the 29th of February, 1876, in order to prove intent. *Held*, that the evidence was inadmissible.

*PEOPLE EX REL. GEORGE WILLIS v. JUSTICES*. . . . . 158

— *Misnomer in indictment — pleas in abatement — Demurrer — Disorderly house.*

See *BARNESCIOTTA v. PEOPLE* . . . . . 187

— *Lotteries — what are — 1 R. S. (Edm. ed.), 619, § 82.*

See *WILKINSON v. GILL*. . . . . 156

**CROSS-EXAMINATION** — *General reputation — what questions may be asked as to.* Although usually when general reputation is relied upon, it is not competent to give in evidence specific acts, either to sustain or to overthrow such general reputation, yet when testimony as to general reputation is given by a witness, he may be asked upon his cross-examination, with a view to lessen the effect of his testimony as to general reputation, or to show a bias in favor of the party who has called him, but not for the purpose of establishing the fact to be proved, whether he has not heard reports which tend to contradict the purport and effect of his testimony.

*CARPENTER v. BLAKE* . . . . . 358

**CURTILAGE** — *Meaning of — when it passes with demised premises.*

See *PEOPLE EX REL. MURPHY v. GEDNEY* . . . . . 151

**CUTTING TIMBER** — *Injunction to restrain — not granted for mere threats, unaccompanied by acts.*

See *GRIFFIN v. WINNE*. . . . . 571

**DAMAGES** — *Measure of.* The damages recoverable in a case in which the claimant seeks to recover on an agreement to support and maintain the testator during the term of his natural life, is the amount which the board of the testator and his nursing during his last illness were reasonably worth, less the value of any services rendered by him.

*SHAKESPEARE v. MARKHAM*. . . . . 311

— *Action to recover, for negligent killing — under chap. 450 of 1847, as amended by chap. 256 of 1849 — jury cannot allow interest upon their verdict — chap. 78 of 1870 does not affect actions brought before, though pending at, the time of its enactment.*

See *COOK v. N. Y. CEN. AND HUD. R. R. CO.* . . . . . 426

— *On breach of a contract to reside with a person in consideration of board, etc. — sale of furniture made necessary by so doing — loss upon such sale cannot be recovered in action for breach of the contract.*

See *CANDY v. CANDY* . . . . . 88

— *Measure of, on compromise induced by fraudulent representations — remedy of creditor.*

See *WHITESIDE v. HYMAN* . . . . . 218

**DAMAGES** — *Continued.*

PAGE.

— *Measure of* — chap. 287 of 1874 — *constitutionality of* — *right of eminent domain* — *notice to persons affected by exercise of* — *assessment of damages upon property benefited.*

See LONG ISLAND R. R. Co. v. BENNETT..... 91

— *Liability of attorney for malpractice.*

See VON WALLHOFFEN v. NEWCOMBE..... 236

**DEBTOR AND CREDITOR** — *Remedy of creditor* — *on compromise induced by fraudulent representations of debtor* — *measure of damages* — *evidence.*

See WHITESIDE v. HYMAN..... 218

— *Fraudulent conveyance* — *remedy of creditor.*

See VAN WYCK v. BAKER..... 39

**DECEASED PERSONS** — *Examination as to effects of* — chap. 394 of 1870 — *inadmissibility of testimony objectionable under § 399 of the Code* — *order for delivery of property to executor* — *evidence justifying* — *form of order.*

See TILTON v. ORMEBY..... 7

**DEED** — *Description in* — *survey must commence at place of beginning.*] In determining what premises are conveyed by a deed, the survey must be commenced at the place of beginning designated in the deed, unless it clearly appears that to do so would destroy the grant.

The fact that to commence at said point would give to the grantee more or less land than the deed calls for, does not authorize a departure from the general rule. ELLIOTT v. LEWIS..... 486

**DEFENSE** — *Infancy* — *fraudulent representations.*] 1. Where the substantive ground of an action against an infant is contract, as well as where the contract is stated as an inducement to an alleged tort, infancy is a defense.

HEWITT v. WARREN..... 560

2. — *Denial of ownership of promissory note sued upon.*] In an action against the maker and payee of a promissory note indorsed in blank, it is no defense thereto to allege that the plaintiff is not the owner and holder of the note or the real party in interest, and that some one else is.

HAYS v. SOUTHGATE..... 511

— *Character of* — *not considered on motion to allow an amendment setting up usury.*

See BARNETT v. MEYER..... 109

— *Res adjudicata* — *what is.*

See CANDEE v. BUREE..... 350

**DEFICIENCY** — *On sale of premises in foreclosure* — *when leave of court necessary to maintain action to recover.*

See SCOFIELD v. DOSCHER..... 582

**DEFINITION** — “*Ourtillage*” — *meaning of.*

See PEOPLE EX REL. MURPHY v. GEDNEY..... 151

— “*More or less*” — *meaning of, in contract to supply materials.*

See HARRINGTON v. MAYOR..... 248

**DEL CREDERE COMMISSION** — *Factor selling under* — *rights of assignee or receiver of such factor.*

See FRANKLYN v. SPRAGUE..... 589

**DELIVERY** — *Partial* — *under contract of sale prior to date contracted for by purchaser* — *where contract is entire* — *destruction by fire of part delivered* — *who must bear loss.*

See CORRIGAN v. SHEFFIELD..... 227

— *Of goods, by common carrier to wrong person* — *liability for* — *distinction between liability of common carrier and warehouseman.*

See SCHEU v. ERIE RAILWAY Co..... 496

**DEMURRER** — *Contract of sale* — *specific performance* — *when ordered, notwithstanding failure of plaintiff to tender deed* — *prayer for judgment* — *sufficient, when appropriate to, though not covering all required in a proper judgment.*

See BUSS v. KOCH..... 299



<b>DEMURRER</b> — <i>Continued.</i>	PAGE.
— <i>To complaint for goods sold, and not alleging non-payment, on the ground that it did not state facts sufficient, etc., held frivolous.</i>	
<i>See</i> SALISBURY v. STINSON.....	242
<b>DEPOSITS</b> — <i>Made by savings banks — preference in payment of, given by § 48 of chap. 871 of 1875 — Receiver of bank — when estopped from questioning acts of officers of.</i>	
<i>See</i> ROSENBACK v. MANUF. AND BUILDERS' BANK .....	148
<b>DESCRIPTION</b> — <i>In deed — survey must commence at the place of beginning.</i>	
<i>See</i> ELLIOTT v. LEWIS.....	486
<b>DISCHARGE</b> — <i>From militia — Actual, and not constructive, service of seven years required.</i>	
<i>See</i> PEOPLE EX REL. PERAULT v. TURNER.....	146
— <i>Of bankrupt — application for — within what time it must be made — § 29 bankrupt act.</i>	
<i>See</i> WOOD v. HAZEN .....	362
<b>DISCONTINUANCE</b> — <i>Of action — Trial fee — Costs.] 1. After an action had been noticed for trial and placed upon the calendar, and just as it was about to be moved for trial, an order was entered discontinuing the action upon payment of costs. Held, that the defendant was not entitled to include a trial fee in such costs.</i>	
<i>SUTPHEN v. LASH.....</i>	120
2. — <i>When judgment may be entered for, on order discontinuing the action — Practice, when action is discontinued.] Where an order is entered discontinuing an action on payment of costs, the defendant may, so long as the costs are unpaid, enter judgment therefor and issue execution thereon, or he may disregard the order and proceed with the action as though it had never been entered. Id.</i>	
3. — <i>Of action — on ground that it has been settled — what must be shown upon application for.] Where a motion is made to discontinue an action, on the ground that one of the defendants has settled and discharged the plaintiff's claim, the party so applying must furnish such evidence in proof thereof as would be sufficient to sustain a plea of puis darrien continuance, or a supplementary answer setting up such settlement.</i>	
<i>CONNORS v. TITUS.....</i>	235
<b>DISORDERLY HOUSE</b> — <i>When a nuisance.] Upon the trial of an indictment for keeping a disorderly house, it is not necessary to show that it was so kept as to disturb the peace of the general public or of the particular neighborhood. It is sufficient if it be shown that it is a house of prostitution, open promiscuously, and to which large numbers of people resort for the purpose of prostitution.</i>	
<i>BARNESCIOTTA v. PEOPLE.....</i>	187
<b>DIVISIBLE AND INDIVISIBLE CLAIMS</b> — <i>How distinguished — Assigning of portion of indivisible claim — effect of.] In an action brought against four defendants, an attorney appeared and put in answers for all of them, and appeared for and defended their interests upon the trial. Subsequently, he having assigned to the plaintiff herein his claim against two of the said defendants, the assignee brought this action against the said two defendants and recovered the whole amount of the attorney's claim. Held,</i>	
(1) That the claim of the attorney against the four defendants was an indivisible one;	
(2) That the assignment to the plaintiff did not assign the whole claim to him, and, the claim being indivisible, did not invest him with any separate portion of it.	
<i>MULFORD v. HODGES.....</i>	79
<b>DIVORCE</b> — <i>Alimony.] Upon an application by a wife for divorce, the court will not, as a rule, award to her, for alimony, more than one-third of her husband's entire estate.</i>	
<i>COLLINS v. COLLINS.....</i>	272
<b>DOGS</b> — <i>Liability of owner, for injuries caused by.</i>	
<i>See</i> MULLIN v. MCKESSON.....	44
<b>DOWER</b> — <i>Release of, by wife — consideration required to sustain it — chap. 875 of 1849.</i>	
<i>See</i> CURRY v. CURRY .....	366
<b>HUN</b> — VOL. X.	80

	PAGE.
<b>DRAINAGE</b> — <i>Of marsh lands—chap. 888 of 1869—Application for appointment of commissioners to appraise damages—Petition—contents of.</i> <i>See MATTER OF MARSH</i> .....	49
<b>DUTIES :</b> <i>See ASSESSMENT.</i>	
<b>EASEMENT</b> — <i>Right to use water from spring on another's land.</i> <i>See MERRILL v. CALKINS</i> .....	495
<b>EJECTMENT</b> — <i>Meane profits— indefinite allegations as to, in complaint.]</i> When, in an action of ejectment, it appears from the complaint that the plaintiff claims to recover the value of the rents and profits of the premises during the time they have been unlawfully withheld by the defendant, it is too late, on the trial, to object to the form and want of particularity and certainty with which the allegations relating thereto are made. <i>CANDEE v. BURKE</i> .....	350
— <i>Cannot be brought by the committee of the person and estate of a lunatic in his own name—for real property which belonged to the lunatic prior to his (the committee's) appointment.</i> <i>See BURNETT v. BOOKSTAYER</i> .....	481
<b>EMINENT DOMAIN</b> — <i>Right of—notice to persons affected by exercise of—chap. 287 of 1874—Damages—measure of—assessment of, upon property benefited.</i> <i>See LONG ISLAND R. R. Co. v. BENNETT</i> .....	91
— <i>Effect of taking a portion of mortgaged land by right of—right of mortgagee to the award.</i> <i>See HOOKER v. MARTIN</i> .....	302
<b>ENCROACHMENT</b> — <i>On highway—order by commissioners directing removal of—form of, when signed by only two commissioners—chapter 482 of 1875 not a local bill—constitutionality of—power of board of supervisors to reduce width of highway—notice to parties interested.</i> <i>See PHILLIPS v. SCHUMACKER</i> .....	405
<b>ENGINE AND BOILER</b> — <i>When they remain personal property after annexation to realty—Chattel mortgage on—effect of.]</i> The defendant H. purchased of M. & L., at Rochester, an engine and boiler, to be used in a business carried on by him at Barre, his purpose so to use them being known to the sellers at the time. To secure payment of the price, he gave to M. & L. a chattel mortgage upon the engine and boiler, and certain other personal property, by which they were authorized, in case of default, to enter upon the premises of the mortgagee, or any other place where the mortgaged property might be, and take possession of the property. The engine and boiler were placed in a cheaply-constructed building in such a manner as that, but for the mortgage, they would become a part of the realty. <i>Held</i> , that the engine and boiler continued to be personal property, in favor of the holders of the chattel mortgage, as against a purchaser of the land and building upon a sale under an execution, issued on a judgment subsequently recovered against the mortgagor. <i>SISSON v. HIBBARD</i> .....	420
<b>ENGINEER'S CERTIFICATE</b> — <i>Error in—corporation not bound by unauthorized payments under.</i> <i>See DONOHUE v. MAYOR</i> .....	37
<b>EQUITY</b> — <i>Court-martial—Restraints of, by injunction.]</i> A court of equity will not restrain, by injunction, a court martial from trying one, subject to its jurisdiction, where he alleges as the only ground for such injunction, that he has already been tried upon the same charge, and that he apprehends that the second trial will be unfairly conducted. <i>PERAULT v. RAND</i> .....	223
— <i>Bill quia timet—when proper.</i> <i>See SCHROEDER v. GURNEY</i> .....	418

**EQUITABLE JURISDICTION** — *Of Supreme Court — extent of — Const., art. 6, sec. 8.*] 1. The equitable jurisdiction of the Supreme Court includes all cases which may be properly comprehended within established and existing equitable principles. It is not necessary to establish the existence of some definite precedent for the action which is sought to be maintained.

**YOUNGS v. CARTER**..... 194

2. — *Fraud — conveyance by one, with intent to defraud intended wife of dower — remedy of wife.*] One John Youngs, a widower, was engaged to be married to the plaintiff on the 27th of August, 1872, but in consequence of his sickness on that day the marriage was postponed to the third of September. On the thirtieth of August he, without the knowledge of the plaintiff, conveyed real estate, of the value of \$150,000, comprising nearly the whole of his estate, to two daughters by a former marriage, and took back from them a lease of the same for his life.

After the marriage the plaintiff, upon learning that said conveyance had been made, brought this action to set the same aside. *Held*, that the conveyance was a fraud upon the rights of the wife; that the same should be adjudged void as to her inchoate right of dower, and that she should be adjudged entitled to a dower right in the land so conveyed.

*Held*, further, that she might maintain such action during the life of the husband. *Id.*

**ESTOPPEL** — *Ultra vires.*] 1. Where a national bank indorsed upon the back of a contract, at the time it was made, that a party had on that day deposited with it \$2,500 "to be held by us as collateral security for the faithful performance of the within contract," *held*, that it was within the power of the bank to enter into the contract. That even if the contract were *ultra vires*, yet, as it was not illegal, the bank was estopped from setting up that defense, as it would be a fraud upon the plaintiff to allow it to do so, he having entered into the contract relying thereon.

**BUSHNELL v. CHAUTAUQUE COUNTY NATIONAL BANK**..... 878

2. — *Insurance — applicant misled by agent of company.*] Where an applicant for a life policy is misled by the agent of the insurance company into making an erroneous reference as to his family physician in the answers made by him to the interrogatories put to him on such application, the company is estopped from insisting thereon.

**HIGGINS v. PHOENIX MUTUAL LIFE INS. CO**..... 459

— *When insurance company estopped by acts of agent.*

*See GATES v. PENN. FIRE INS. CO*..... 489

— *Certificate of mortgagors on sale of mortgage to third parties — when it operates as an estoppel to plea of usury by them.*

*See NICHOLS v. NUBBAUM*..... 214

— *When party estopped from denying the legal existence of a corporation.*

*See LOANERS' BANK v. JACOBY*..... 143

— *Receiver of bank — when estopped from questioning acts of officers of.*

*See ROSENBACK v. MANUF. AND BUILDERS' BANK*..... 148

**EVIDENCE** — *Fraudulent representations — compromise induced thereby — Remedy of creditor.*] 1. Where a creditor is induced to compromise a debt upon the receipt of fifty cents on the dollar by means of the false and fraudulent representations made to him by the debtor that another of his creditors has agreed to accept such compromise, the creditor may, upon discovering the falsity of such representation, maintain an action against the debtor to recover the damages sustained by reason thereof. **WHITESIDE v. HYMAN** ... 218

2. — *Measure of damages.*] As in such an action the damages sustained by the plaintiff depend upon the ability of the debtor to pay more than a moiety of his debts, it is competent to ask the witnesses for the defense whether the defendant held property or assets sufficient to pay over fifty cents on the dollar of his liabilities. *Id.*

3. — *Of assignment of claim.*] A judgment on an accounting is receivable as evidence, although recovered after the action in which it is introduced was commenced, when it shows that the defendant had become the owner

**EVIDENCE — Continued.**

PAGE.

of the claim against the plaintiff, which he was entitled to set up as a counter-claim in such action. *VAIL v. TUTHILL*..... 31

4. — *Burden of proof — Statute of limitations.*] Where money is deposited with any individual, not a banker, trustee or agent, upon an agreement that he shall pay interest thereon, and that the same shall not be withdrawn except by drafts payable thirty days after sight, no presumption of payment arises, nor will the statute of limitations run against the debt until it is shown that drafts drawn against the said person, in pursuance of the agreement, have been presented and dishonored. It rests upon the party claiming the benefit of the statute to show the presentation and dishonor of such drafts. *SULLIVAN v. FOSDICK*..... 173

5. — *Statement by witness, of what was said to him by another witness before the trial — admissibility of.*] Upon the trial of an action, in which the question at issue was the number of loads of hay delivered at a particular time, a witness stated that he could not then remember the number, but that he knew it at the time and then told it to the plaintiff. Subsequently plaintiff was called as a witness and was allowed, against defendant's objection and exception, to state that the number was fourteen. *Held*, that the evidence was admissible. *SHEAR v. VAN DYKE*..... 528

6. — *Testimony of witness as to general reputation — what questions may be put to witness.*] Although, usually when general reputation is relied upon, it is not competent to give in evidence specific acts, either to sustain or to overthrow such general reputation, yet when testimony as to general reputation is given by a witness, he may be asked upon his cross-examination, with a view to lessen the effect of his testimony as to general reputation, or to show a bias in favor of the party who has called him, but not for the purpose of establishing the fact to be proved, whether he has not heard reports which tend to contradict the purport and effect of his testimony. *CARPENTER v. BLAKE*..... 858

7. — *Answers to cross-interrogatories of witness examined on commission — by whom they may be read in evidence.*] Upon the trial of an action in which a witness has been examined on commission, the party at whose instance it was issued, may, after reading in evidence the direct interrogatories and the answers thereto, read in evidence the cross interrogatories and answers, even though the party by whom they were framed may object to his so doing. *MARSHALL v. WATERTOWN STEAM ENGINE CO.*..... 468

8. — *Code, § 399.*] Although, under section 399 of the Code, a party to an action may testify as to a conversation between the deceased and a third person which he has overheard, so long as such testimony is limited to what was neither a personal transaction nor communication between the witness and the deceased, yet this rule does not prevail when the third person is an agent for, and is acting in the interest of the witness. *HEAD v. TEEFER*.... 548

— *Of experts — in a case of alleged forgery — as to signature being simulated — comparison of handwritings.*

See *MILES v. LOOMIS*..... 373

— *On probate of will — admissions of devisees — when admissible — improper rejection of by surrogate — when his judgment reversed because of.*

See *HORN v. PULLMAN*..... 471

— *Presumption as to payment of assessment.*

See *MATTER OF STRIKER*..... 308

— *Presumption as to jurisdiction of Court of General Sessions of New York city.*

See *MATTER OF JENNINGS*..... 310

— *Certified copy of chattel mortgage admissible as, of the date of filing — but not of the existence and execution of mortgage.*

See *SUNDERLIN v. WYMAN*..... 496

— *Insurance — conversations between assured and agent of company admissible in evidence.*

See *HIGGINS v. PHOENIX MUTUAL LIFE INSURANCE COMPANY*.... 459

**EVIDENCE—Continued.**

PAGE.

— Burden of proof—articles loaned for specific purpose—if used for other purposes—burden of proof, as to cause of injury. See <i>BUCHANAN v. SMITH</i> .....	474
— Of experts—insanity—what questions may be asked. See <i>KOENIG v. GLOBE MUTUAL LIFE INSURANCE COMPANY</i> .....	558
— As to value of personal property—what can be obtained for it in a public market is evidence bearing on its value and is admissible on that question. See <i>TIERNEY v. N. Y. C. AND H. R. R. R. CO.</i> .....	569
— When statement of landlord, as to demised premises, admissible— <i>Curtilage</i> . See <i>PEOPLE EX REL. MURPHY v. GEDNEY</i> .....	151
— Criminal law, evidence of another distinct crime, for purpose of showing intent—admissibility of. See <i>PEOPLE EX REL. GEORGE WILLIS v. JUSTICES</i> .....	158
— Not admissible, to show the meaning among insurance men of the words in a fire policy, "standing detached." See <i>HILL v. HIBERNIA INS. CO.</i> .....	26
— Legal existence of corporation—when party estopped from denying. See <i>LOANERS' BANK v. JACOBY</i> .....	143
— Against whom a judgment of foreclosure of mortgage on railroad, may be read in evidence. See <i>MURRAY v. DEYO</i> .....	8
— Estoppel—certificate of mortgagors on sale of mortgage to third person—when it operates as an estoppel to a defense of usury. See <i>NICHOLS v. NUBSBAUM</i> .....	214
— Necessary to justify—order for delivery of effects of deceased to executor under chap. 894 of 1870. See <i>TILTON v. ORMSBY</i> .....	7
— What question calls for opinion of witness. See <i>MURRAY v. DEYO</i> .....	8
— Of experts—form of question—Tonnage of vessel given in charter-party not conclusive. See <i>DOLZ v. MORRIS</i> .....	201
— Of settlement of action—what must be shown on application for discontinuance of. See <i>CONNORS v. TITUS</i> .....	285
— What proper, to establish want of consideration for bill of exchange. See <i>McCULLOCH v. HOFFMAN</i> .....	138
— The reducing of part of a contract to writing—does not preclude oral evidence of the residuum. See <i>BREWERS' FIRE INS. CO. v. BURGER</i> .....	56

**EVICTIION**—Of tenant by his landlord—effect of, on summary proceedings for non-payment of rent.] Where a tenant has been evicted by the landlord from a portion of the demised premises of substantial value, he cannot be evicted in summary proceedings for non-payment of rent so long as such eviction continues. *PEOPLE EX REL. MURPHY v. GEDNEY*..... 151

**EXAMINATION**—Of witness on commission—answers to cross-interrogatories—by whom they may be read in evidence.] Upon the trial of an action in which a witness has been examined on commission, the party at whose instance it was issued, may, after reading in evidence the direct-interrogatories and the answer thereto, read in evidence the cross-interrogatories and answers, even though the party by whom they were framed may object to his so doing. *MARSHALL v. WATERTOWN STEAM ENGINE CO.*..... 468

**EXCAVATION**—In streets—liability of municipal corporation for—what precautions are required to guard against accidents from.  
See *PARER v. CITY OF COHOES*..... 531

**EXCISE LAW** — *Petition of twenty freeholders — Hotel and tavern license.*] The provisions of section 6 of chapter 628 of 1857, requiring a petition of twenty freeholders as a prerequisite to the granting of a license for the sale of spirituous liquors, is repealed by section 4 of chapter 175 of 1870, as amended by section 2 of chapter 549 of 1873.

The provision of said act, forbidding the granting of licenses to persons not having sufficient ability to keep tavern, and not having the necessary accommodations to entertain travelers, is still in force.

**PEOPLE v. HARTMANN**..... 602

**EXECUTION** — *Action against sheriff for failure to return — return of, nulla bona after commencement of action — effect of.*

*See* **BECKSTEIN v. SAMMIS**..... 565

— *When set aside.*

*See* **HOWK v. BISHOP**..... 509

**EXECUTORS AND ADMINISTRATORS** — *Administrator with will annexed — what assets justify his appointment.*] 1. Where an application is made to a surrogate for letters of administration upon the estate of one who has died in a foreign country, upon the ground that he has left assets in the county of such surrogate, it is sufficient if it appear that the deceased had a claim against a resident of the said county for money deposited with him, even though it should subsequently be shown that such claim was invalid and incapable of enforcement. **SULLIVAN v. FOSDICK**..... 173

2. — *Appointment cannot be attacked collaterally.*] Where a surrogate has issued letters of administration, with the will annexed, upon the estate of one who has died in a foreign country, neither the validity of the will nor the authority of the administrator can be attacked, by one against whom an action is brought to recover a debt alleged to be due to the estate. *Id.*

3. — *Administers entire personally.*] The authority of an administrator, with the will annexed, is not confined to the property disposed of by the will, but it is his duty to collect and administer the entire personal estate within his jurisdiction. *Id.*

4. — *Counsel fee — when not allowed — expenses of.*] The expenses incurred by an executor, in an unsuccessful attempt to enforce before the surrogate a claim made by him against the estate, including the fees of an auditor and his own counsel fees therein, should not be allowed to him out of the estate.

**SHAKESPEARE v. MARKHAM**..... 311

— *Accounting by — next of kin must be parties to — statute of limitations — how interposed in such proceedings.*

*See* **CLOCK v. CHADEAGNE**..... 97

— *Revival of action by — right of action shown to be in the executor individually — no power in court to amend pleadings upon the trial.*

*See* **PHILLIPS v. MELVILLE**..... 211

**EXECUTORS AND TRUSTEES** — *Application for an accounting by, under 2 R. S., 92, § 52 — may be made by one co-trustee.*] 1. Where a testator devises all the rest, residue and remainder of his estate to his executors, to carry out the trust created by his will, one of such executors may apply to the surrogate, under section 52 of 2 Revised Statutes (92), for an order requiring his co-executor to render and file an account as therein provided.

**BUCHAN v. RENTOUL**..... 188

2. — *Power of surrogate of New York to order a reference to take such account — chap. 859 of 1870, sec. 6.*] Where objections are filed by such applicant to the account rendered in pursuance of such an order, the surrogate of New York may, under section 6 of chapter 859 of 1870, appoint a referee to examine such account, and report thereon to him. *Id.*

**EXEMPTION** — *From taxation — § 5, 1 R. S. (5th ed.), 906 — effect of running highway through lot.*] The exemption from taxation, created by section 5 of 1 Revised Statutes (5th ed.), 906, in favor of the "lots" upon which the buildings therein specified are situated, is not affected by the fact that such lot is divided by a highway into two portions, one of which is

**EXEMPTION—** *Continued.*

PAGE.

occupied by college buildings, and the other as a garden for the use of the pupils and teachers and for their recreation and walks, the whole lot being used for precisely the same purposes as before the construction of the highway. *PEOPLE EX REL. ST. JOHN'S COLLEGE v. COMMISSIONERS OF TAXES*, 246

**EXISTING DEBT—** *Mortgage for—mortgages not bona fide purchaser.*

*See VAN SLYCK v. NEWTON*..... 554

**EXPERTS—** *Testimony of—form of questions—Tonnage of vessel given in charter-party—when not conclusive.*] Upon the trial of this action, brought to recover damages for a breach of a charter-party, the principal question was whether or not the ship, which had been disabled by a storm while near the port of Vera Cruz, could have put into any of the ports in the Gulf of Mexico or in the southern Atlantic States. Upon the trial, experts, called on behalf of the plaintiff, were asked, against the defendant's objection and exception, the following question: "Under the state of facts mentioned in that deposition, what ports could the captain have made in the Gulf of Mexico?" They were also asked other questions to the same effect. *Held*, that it was error to admit the questions, as they allowed, and compelled each witness to determine for himself what facts were proved by the deposition, and thus usurp the functions of the jury. *DOLZ v. MORRIS*..... 201

— *Evidence of, in cases of insanity—what questions may be asked.*

*See KOENIG v. GLOBE MUT. LIFE INS. CO.*..... 558

— *Forgery—opinion of, as to signature being simulated—comparison of handwriting*

*See MILES v. LOOMIS*..... 872

**EXTENSION OF TIME—** *Of payment, of a mortgage by mortgagee to grantee assuming payment of mortgage—does not affect the liability of mortgagor to mortgagee.*

*See MEYER v. LATEROP*..... 66

— *Of payment—by mortgagee, made with one to whom the mortgaged property has been conveyed, subject to the mortgage—does not thereby relieve the mortgagor from his liability upon the bond executed at the time of the giving of the mortgage.*

*See PENFIELD v. GOODRICH*..... 41

**FACTOR—** *Selling under del credere commission—rights of assignee or receiver of.*] Where a factor, acting under a *del credere* commission, fails, after having made advances to his consignor in the form of notes and acceptances, his receiver or assignee is entitled, as against the assignee and general creditors of the consignor, to retain in his hands the amounts arising from the sale of the goods, until such notes or acceptances are surrendered or destroyed.

*FRANCKLYN v. SPRAGUE*..... 589

**FAMILY—** *Services rendered by one member of a family to another—recovery for—when proper.*] Defendant's testatrix being taken sick, sent for the plaintiff, her daughter, who had a family of her own, with whom she resided, to come and take care of her. Plaintiff accordingly left her home and resided with and took care of the deceased for nearly four years, during which time the deceased frequently said that the plaintiff should be well rewarded therefor.

In an action brought to recover the value of such services, after the death of the testatrix, *held*, that it was not to be classed with the ordinary cases of services rendered by one member of a family to another, and that plaintiff was entitled to recover. *MARKEY v. BREWSTER*..... 16

**FALSE IMPRISONMENT—** *And malicious prosecution—action for, may be alleged in different counts of the same complaint—when both arise out of one and the same transaction.*

*See BARR v. SHAW*..... 580

**FEROCIOUS ANIMALS—** *Liability of owner of.*] The plaintiff, who was employed in the defendants' factory, while passing through the yard early in the morning, to admit the other operatives to the factory, was attacked and severely injured by a large Siberian bloodhound, owned by the defendants,

**FEROCEOUS ANIMALS**—*Continued.*

PAGE.

and of whose vicious habits and dangerous character they had full knowledge. The dog was kept chained during the day, and let loose at night; it being the duty of the defendants' engineer to chain him up before the workmen were admitted.

Upon the trial of this action, brought to recover damages for the injuries so sustained, it was insisted that, as the accident occurred through the negligence of a co-servant in omitting to chain up the dog, and as the plaintiff had knowledge of its vicious habits, he could not recover. *Held*, that the defense was properly overruled.

Duties and liabilities of owners of ferocious and vicious animals considered.

MULLER v. MCKESSON ..... 44

**FORECLOSURE**—*Sale—division of mortgaged premises into lots by mortgagor—when sold in parcels.*] 1. The plaintiff conveyed to defendant a tract of land four hundred and ten feet by one hundred and nine feet ten inches, which had always been used as one residence, and took back a purchase-money mortgage thereon. Subsequently the defendant, without the assent of the plaintiff, made a map of the land, and laid out an avenue sixty feet wide through the middle thereof and two lanes upon the ends, which were opened, but never dedicated to the public. Upon a sale under a foreclosure of the mortgage, the defendant insisted that the land should be sold according to the lots laid down on the map. *Held*, that the sheriff was right in refusing so to do, and in selling the land in one tract. LANE v. CONGER ..... 1

2. — *Appointment of receiver in, on application of subsequent incumbrancer—who entitled to amount collected.*] Where, in an action brought to foreclose a mortgage, a subsequent incumbrancer, who is made a party defendant thereto, applies, in his own behalf for, and secures the appointment of a receiver of the rents and profits of the mortgaged premises, he is entitled to retain the amount collected by the receiver as against the claim of a prior mortgagee whose debt the amount realized upon the sale of the mortgaged property, under the judgment entered in the action, has been insufficient to satisfy. WASHINGTON LIFE INS. CO. v. FLEISCHAUER ..... 117

8. — *Of mortgage—action to recover deficiency, after judgment of foreclosure and sale—leave of court to maintain—when necessary.*] In an action brought to foreclose a mortgage, the mortgagor and executor of a person to whom a portion of the mortgaged premises had been conveyed, he having agreed to pay a portion of the mortgage, were made parties defendant, the executor being notified that no personal judgment would be taken against him. A deficiency having arisen upon the sale, a judgment for deficiency was entered against the mortgagor. Subsequently, this action was brought against the executor to recover a judgment for the same deficiency against him. *Held*, that the plaintiff could not maintain the action, without first obtaining permission of the court so to do. SCOFIELD v. DOSCHER ..... 562

— *Judgment in action for—taking of portion of mortgaged property by city for public use—effect of—right of plaintiff (mortgages) to the award.*

See HOOKER v. MARTIN ..... 302

— *Of mortgage on railroad—trustees taking possession of road under—right of debtor of road to offset claim against the company falling due after change of possession—judgment of foreclosure—against whom it may be read in evidence.*

See MURRAY v. DEYO ..... 8

**FORGERY**—*Experts—opinion of, as to signature being simulated—comparison of handwritings.*] Where, in an action upon a promissory note, the defense of forgery is interposed, experts, as to handwriting, may be permitted to give their opinion from a comparison of the disputed signature with other genuine writings in evidence in the case, and to state, from an examination of the genuine writings and the disputed signature, whether the latter appears to be simulated. MILES v. LOOMIS ..... 372

**FRAUDULENT CONVEYANCE**—*Remedy of creditor—power of court to direct a sale by its officers of real estate fraudulently conveyed.*] 1. The Supreme Court has no power to effect a transfer of the title to land by directing a sale thereof by its officers, except in special cases authorized by the statutes of the State. VAN WYCK v. BAKER ..... 89



**FRAUDULENT CONVEYANCE** — *Continued.*

PAGE.

— 2. *Decree—form of.*] In suits by creditors to reach lands conveyed with intent to defraud them, the decree should set aside the fraudulent conveyance and permit the creditor to issue an execution and sell thereunder, or compel the debtor to convey to a receiver, and order the latter to sell. *Id.*

— *By one just before marriage, with intent to defraud intended wife of dower—remedy of wife.*

*See* YOUNGS *v.* CARTER..... 194

**FRAUDULENT REPRESENTATIONS** — *Compromise induced thereby—remedy of creditor.*]

1. Where a creditor is induced to compromise a debt upon the receipt of fifty cents on the dollar, by means of the false and fraudulent representations made to him by the debtor, that another of his creditors has agreed to accept such compromise, the creditor may, upon discovering the falsity of such representations, maintain an action against the debtor to recover the damages sustained by reason thereof. *WHITEHEAD v. HYMAN*.... 218

2. — *Measure of damages—evidence.*] As in such an action the damages sustained by the plaintiff depend upon the ability of the debtor to pay more than a moiety of his debts, it is competent to ask witnesses for the defense whether the defendant held property or assets sufficient to pay over fifty cents on the dollar of his liabilities. *Id.*

— 3. *Liability of infant for.*] This action was brought to recover damages for false and fraudulent representations made by the defendant upon the sale of a horse. The complaint alleged that the false and fraudulent representations were made in a warranty contained in the contract of sale, with intent to deceive and defraud the plaintiff. The defense was infancy. *Held*, that as the plaintiff had not disaffirmed the contract, or returned or offered to return the horse, that he was not entitled to recover.

*HEWITT v. WARREN*..... 560

4. — *Remedy.*] The proper remedy in such a case would be to return or to offer to return the horse, and thus put the infant in the position of a mere wrong-doer, unjustly keeping what he had fraudulently obtained.

5. — *The action must be purely for tort.*] Where the substantive ground of the action is contract, as well as where the contract is stated as inducement to an alleged tort, infancy is a defense. *Id.*

— *Statements in railroad bonds—bona fide purchaser—what facts sufficient to put upon inquiry.*

*See* CAYLUS *v.* N. Y., K. AND S. R. R. Co..... 295

**GAMBLING** — *Lotteries—what are—1 R. S. (Edm. ed.), 619, § 32.*

*See* WILKINSON *v.* GILL..... 156

**GENERAL REPUTATION** — *Examination of witness as to—what questions may be asked.*]

Although usually when general reputation is relied upon, it is not competent to give in evidence specific acts, either to sustain or to overthrow such general reputation, yet when testimony as to general reputation is given by a witness, he may be asked upon his cross-examination, with a view to lessen the effect of his testimony as to general reputation, or to show a bias in favor of the party who has called him, but not for the purpose of establishing the fact to be proved, whether he has not heard reports which tend to contradict the purport and effect of his testimony.

*CARPENTER v. BLAKE*..... 358

**GENERAL SESSIONS** — *Court of, in New York city—jurisdiction of—presumption as to.*

*See* MATTER OF JENNINGS..... 810

**GRANTOR AND GRANTEE** — *Relation between grantor and grantee assuming payment of mortgage—extension of time of payment.*

*See* MEYER *v.* LATHROP..... 66

— *When grantee takes subject to the mortgage—effect of extension of time of payment.*

*See* PENFIELD *v.* GOODRICH..... 41

HUN—VOL. X. 81

**GRANTOR AND GRANTEE** — *Continued.*

PAGE.

— *Contract of sale — partial delivery under, prior to time contracted for by purchaser — destruction of property by fire, before acceptance — who must bear the loss.*

See *CORRIGAN v. SHEFFIELD*..... 287

**HABEAS CORPUS** — *Judgments of courts-martial — when court had jurisdiction and power to render same — cannot be reviewed on.*

See *PEOPLE EX REL. UNDERHILL v. FULLERTON*..... 68

**HANDWRITINGS** — *Comparison of — evidence of experts founded upon, as to forgery.*

See *MILES v. LOOMIS*..... 372

**HEALTH** — *Board of, Syracuse — power of, to appoint inspector of milk — destruction of impure milk.*

See *BLAZIER v. MILLER*..... 485

**HEIR AT LAW** — *Of deceased grantor — Action against, for breach of covenant — when maintainable.] In order to maintain an action against the heir at law of a deceased grantor, to recover damages occasioned by the breach of a covenant contained in a conveyance made by the ancestor, it must be shown that the deceased left no personal property within this State, or that the same was insufficient to pay the debt, or that the debt could not be collected from the personal representatives of the grantor, or from his next of kin or legatees.* *ARMSTRONG v. WING* .. 520

**HIGHWAY** — *Use of, by railroad company — consent of owner thereto — effect of — injunction.*

See *MURDOCK v. PROSPECT PARK AND C. I. R. R. Co.*..... 598

— *Excavations in, liability of municipal corporations for — what precautions are required.*

See *PARKER v. CITY OF COHOES*..... 531

— *Commissioners of — order directing removal of encroachment — form of, when signed by only two commissioners — chapter 482 of 1875 — not a local bill — constitutionality of — power of board of supervisors to reduce width of highway — notice to parties interested.*

See *PHILLIPS v. SCHUMACKER*..... 405

— *Liability of city for defects in — funds in treasury to make repairs not essential to — right of persons with defective sight to travel on highway — notice to city — how proved.*

See *PEACH v. CITY OF UTICA*..... 477

— *Commissioner of, is not agent of the town.*

See *PEOPLE EX REL. VAN KEUREN v. AUDITORS*..... 551

See *STREETS.*

**HOTEL AND TAVERN** — *Licenses — excise law — petition of twenty freeholders.*

See *PEOPLE v. HARTMANN*..... 602

**ILLEGAL TAX** — *Refunding of — power of County Court to order — chapter 695 of 1871.*

See *PEOPLE EX REL. HERMANC v. SUPERVISORS*..... 545

**IMPLIED COVENANT** — *For quiet enjoyment in lease.*

See *PEOPLE EX REL. MURPHY v. GEDNEY*..... 151

**IMPORTS:**

See *ASSESSMENT.*

**IMPOSTS:**

See *ASSESSMENT.*

**INCREASE OF RISK** — *Of premises insured — when case on that question should be left to the jury.*

See *CORNISH v. FARM BUILDING FIRE INS. CO.*..... 466

**INDICTMENT** — *Misnomer* — *Plea in abatement* — *Demurrer* — *Nuisance* — *Disorderly house*.] Upon the arraignment of the plaintiff in error upon an indictment in which he was named "John Barnesciotta, otherwise called Garibaldi," his counsel filed the following plea: "Now comes the defendant Barnesciotta and pleads to the indictment that he is not now, and never was, known by the name of Garibaldi, which he verifies," to which plea the people demurred. *Held*,

(1) That a demurrer was the proper mode of disposing of the plea;

(2) That the plea was properly overruled, as the true name preceded the *alias dictus*.

Upon the trial of an indictment for keeping a disorderly house, it is not necessary to show that it was so kept as to disturb the peace of the general public or of the particular neighborhood; it is sufficient if it be shown that it is a house of prostitution, open promiscuously, and to which large numbers of people resort for the purpose of prostitution.

**BARNESCIOTTA v. PEOPLE** ..... 187

**INDIVISIBLE CLAIM** — *How distinguished from divisible* — *assignment of portion of indivisible claim* — *effect of*.

*See* **MULFORD v. HODGES** ..... 79

**INFANT** — *Liability of, for fraudulent representation* — *action must be purely for tort*.

*See* **HEWITT v. WARREN** ..... 560

**INJUNCTION** — *Damages* — *order of reference to ascertain* — *right of party enjoined to such order*.] 1. The plaintiff procured a temporary injunction restraining the defendant from proceeding with certain work. Upon the return of an order to show cause, the court refused to continue the injunction, and directed that the action be discontinued, without costs. Subsequently defendant moved for a reference to ascertain the damages sustained by the injunction, which motion was denied. *Held*, that this was error, and that the reference should have been granted. **WATERBURY v. BOUKER** ..... 262

2. — *Court-martial*.] A court of equity will not restrain, by injunction, a court-martial from trying one, subject to its jurisdiction, when he alleges as the only ground for such injunction that he has already been tried upon the same charge, and that he apprehends that the second trial will be unfairly conducted. **PERAULT v. RAND** ..... 222

3. — Where one of several riparian owners pollutes a stream of water, the party aggrieved is entitled to an injunction restraining him from further corrupting or polluting such stream. **SEAMAN v. LEE** ..... 607

4. — *Use of highway by railroad company* — *consent of owner thereto* — *effect of*.] In an action for an injunction, to prevent a railroad corporation from running its cars over a portion of a highway in front of plaintiff's land, the fee of which, subject to the public use, was in plaintiff, who had never received compensation for the use of said highway by the company, it appeared that the company was induced to construct its railroad upon said avenue by the express consent and license of the plaintiff. *Held*, that plaintiff was not entitled to an injunction.

**MURDOCK v. PROSPECT PARK AND C. I. R. R. Co.** ..... 598

— *To restrain cutting timber* — *not granted for mere threats, unaccompanied by acts*.

*See* **GRIFFIN v. WINNE** ..... 571

**INSANE PERSON** — *Sale of real estate of* — *jurisdiction of court* — *reference to ascertain facts* — *when necessary*.

*See* **MATTER OF VALENTINE** ..... 88

**INSANITY** — *Evidence of experts* — *what questions may be asked*.] In this action, brought upon a policy of life insurance, the principal question was whether or not the assured was sane at the time of her death. Upon the trial, her family physician was asked, and against the defendant's objection and exception, allowed to answer the following questions: "From your experience and polling, and from your acquaintance with the mental con-

**INSANITY** — *Continued.*

PAGE.

dition of the deceased, what effect, if any, would you say this disease (melancholia) would have upon her as to her power to control her actions or to resist any impulse with which she might be seized?" "In this case how do you think it was?" *Held*, that the questions were properly admitted.

KOENIG v. GLOBE MUT. LIFE INS. CO. .... 558

**INSOLVENT'S DISCHARGE**—*Application for—Res adjudicata.*] Where, upon an application made by an insolvent debtor for a discharge, it appears that a similar application has already been made to one of the judges of the Court of Common Pleas of the city of New York, and having been fully heard, has been decided against him upon the merits, *held*, that the matter should be regarded as *res adjudicata*, and the application denied.

MATTER OF ROBERTS. .... 248

**INSOLVENT LAW** — *Of State — when suspended by bankruptcy act of 1867 — Petition for discharge under State law — Relinquishment by petitioning judgment creditor of the security for his debt — form of.*

See AUGSBURY v. CROSBYMAN. .... 389

**INSPECTOR OF MILK** — *Power of board of health of Syracuse to appoint — destruction of milk.*

See BLAZIER v. MILLER. .... 435

**INSURANCE** — *Marine — right of abandonment.*] 1. The plaintiff took out policies of insurance upon a ship and cargo owned by him, and also procured one to be issued to him by the defendant upon the freight. The latter policy provided that "no claim for total loss shall be made \* \* \* except in the case of \* \* \* an actual or technical loss of the vessel under the policies of insurance on her." The vessel was wrecked at a short distance from her port of destination, and both vessel and cargo abandoned to the underwriters, including defendant, who took possession of the ship and succeeded in transporting a portion of the cargo to the said port, where it was sold and the proceeds arising thereon distributed among them.

An abandonment of the freight was also made, but the same was not accepted by the defendant. *Held*, that the plaintiff had the right to abandon the freight, and that the defendant was liable under the policy for a total loss thereof, and that his right so to do was not affected by the fact that the underwriters succeeded in transporting a portion of the cargo to the port of destination and there disposing of the same.

HUBBELL v. GREAT WESTERN INS. CO. .... 167

2. — *Acceptance of.*] Where an abandonment has been accepted, the question as to whether or not the loss was a total one is no longer an open one, but where it has not been accepted, the insured must establish by satisfactory proof a state of facts clearly showing his right to abandon. *Id.*

3. — *Policy — meaning of words "standing detached" in — evidence as to their meaning among insurance men, inadmissible.*] Defendant issued a policy of insurance upon plaintiff's "two-story frame dwelling, composition roof, standing detached on the west side of Bennett avenue." The house stood about seven feet from another house. In an action to recover for a loss sustained under the policy, the defendant offered to prove that the words "standing detached" meant, "amongst insurance men generally," that the house was at least twenty-five feet from external exposure.

*Held*, that the evidence was properly rejected; (1) because there was no ambiguity in the meaning of the words; (2) because there was no offer to prove that the particular meaning sought to be given to these words was known to the plaintiff. HILL v. HIBERNIA INS. CO. .... 20

4. — *Loss to property — release by owner to party causing — effect of, on rights of insurance company paying the loss.*] Certain buildings belonging to one Martin having been burned through the negligence of the defendant, a settlement was effected by which, in consideration of a certain sum of money paid to Martin, he discharged the company from all his loss and damages occasioned by the fire. Subsequently, he brought an action against the plaintiff upon a policy of insurance issued by it, and recovered judgment therein, upon payment of which he assigned to the plaintiff any claim against

**INSURANCE — Continued.**

PAGE.

the defendant which might still remain in him after the said settlement. In an action by the plaintiff to recover the amount paid upon the policy of insurance; *held*, that as Martin had discharged all his claim against the defendant, he had no right of action against it which he could assign to the plaintiff, or to which it could be subrogated upon paying the amount of the policy. *CONNECTICUT INS. CO. v. ERIE RAILWAY CO.* ..... 59

5. — *Policy of — transfer of interest by assured — when policy avoided by — Notice of loss — laches in presenting — excuses for.*] This action was upon a policy of insurance, issued by the defendant, containing a condition that "if, without the written consent of the company first had and obtained, the said property shall be sold or conveyed, or the interest of the parties therein be changed in any manner, whether by act of the parties or by operation of law, \* \* \* then, and in every such case, and in either of said events, the said policy shall be null and void." The assured died in 1872, and devised the property to his brother. The loss occurred in 1874. *Held*, that as the interest of the assured in the property had ceased, and he had transferred the same to another person before the occurrence of the loss, no action could be maintained upon the policy. *SHERWOOD v. AGRICULTURAL INS. CO.* ..... 593

6. — *Notice of loss — laches.*] The policy provided that "in case of loss the assured shall give immediate notice thereof to the company." No proofs of loss were given in this case, until after the expiration of five months. *Held*, that the policy was thereby avoided. *Id.*

7. — *Policy of — increase of risk — when case should be left to the jury.*] This action was brought upon a policy of insurance which provided that "any increase of hazard or material change shall avoid this policy, without consent indorsed hereon." The defense was that the premises became and were unoccupied at the time of the fire. Upon the trial, three witnesses, called by the defendant, testified that they were insurance agents, and the risk was increased by the non-occupancy of the premises. No witnesses were called by plaintiff on this point.

Defendant's counsel asked the court to direct a verdict on the ground that it was proved, without contradiction, that the risk had been increased. *Held*, that it was not error for the court to refuse so to do; that, although the evidence was competent and entitled to great weight, the jury had the right to decide the question of increase of risk upon their own views upon that question. *CORNISH v. FARM BUILDINGS FIRE INS. CO.* ..... 466

8. — *Policy of — application for — erroneous answer — Conversation between applicant and agent — admissible in evidence — when company estopped from setting up falsity of answer.*] Plaintiff's assignor having applied for a policy of insurance, the application was filled up by the defendant's agent. The answer to a question as to the name and residence of his family physician was, "Refer to Dr. A. T. Mills, Corning, N. Y." Accompanying the application was a paper headed "Questions to be answered by the physician of the party to be insured," signed by Mills, in which he stated that he never attended Higgins professionally.

Upon the trial of this action, brought to recover on the policy, defendant insisted that it was void, for the reason that Mills was not, but that a Dr. Bryan of Corning was, the family physician of the insured. Against defendant's objection and exception defendant's agent was allowed to state that at the time of the filling up of the application, Higgins said he did not know as he had any one that he could call his family physician; that Dr. Mills had prescribed for him, and that Dr. Bryan had prescribed for him, and he would refer to either of them. The agent asked if he should put down his reference to Dr. Mills, and he said "yes." *Held*:

(1) That the answer being ambiguous, *parol* evidence as to what took place at the time was properly admitted.

(2) That as Higgins was misled by the agent into making an erroneous reference to Mills, the company was estopped from insisting thereon.

*HIGGINS v. PHOENIX MUT. LIFE INS. CO.* ..... 450

9. — *Policy of — when company estopped by acts of agent.*] An agent of defendant having been informed that plaintiff wished to procure a policy of insurance upon a stable owned by him, had a conversation with him, in

**INSURANCE — Continued.**

PAGE.

which plaintiff stated that he held the place under a contract, and that the vendor owed him enough to pay all that was due upon it. Subsequently the agent sent plaintiff a policy in which it was stated that the plaintiff was the owner. No written application was made or signed by plaintiff. The policy provides that the person procuring the insurance, other than the assured himself, should be deemed the agent of the assured. Plaintiff, at the time of the conversation, had no knowledge of the conditions or provisions of the policy.

In an action upon the policy the defense was a violation of a condition providing that if "the interest of the assured were any other than the entire, unconditional and sole ownership, it must be represented to the company and so expressed in the written part of this policy, otherwise the policy shall be void." *Held*,

(1) That as plaintiff was ignorant of the provision contained in the policy making the agent of the company his agent, he was entitled to treat him as the agent of the company.

(2) That as it was the duty of the agent to insert in the policy plaintiff's interest in the premises as it had been disclosed to him, the company was estopped from setting up his failure so to do as a defense to the action.

GATES v. PENN FIRE INS. CO. .... 489

10. — *Policy of — on real and personal property — condition as to incumbrances — policy avoided only as to the portion encumbered.*] Defendant issued a policy of insurance to plaintiff, which insured separately and in separate sums a house and barn and certain personal property belonging to her. The policy contained a condition avoiding it in case the property became incumbered by mortgage or judgment, without the written consent of the company. After the issuing of the policy plaintiff executed two mortgages upon the real estate, of which no notice was given to the company. In an action upon the policy, *held*, that though the giving of the mortgages annulled the policy as to the real estate, it did not avoid it as to the personal property.

MERRILL v. AGRICULTURAL INS. CO. .... 428

11. — *Agent of company — powers of — when company bound by acts of.*] An agent of an insurance company was authorized by his certificate of appointment to make surveys and receive applications for insurance and premiums upon the same, according to the regulations and by-laws of the company. It appeared that, in addition to the acts authorized by the certificate of appointment, he also received and forwarded notices of loss to the company, which were acted upon by it; that he generally informed persons taking out policies to notify him in case of loss; that several persons did so, and the company, upon being notified by him, sent on their general agent and adjuster, who settled the claims without any proofs of loss. *Held*, that the company held the agent out, as authorized by it, to receive notices of loss, and that he therefore had apparent authority to extend the time for serving them, or to waive them altogether.

VAN ALLEN v. FARMERS' JOINT STOCK INS. CO. .... 897

12. — *Waiver of condition of policy.*] Defendant's agent, having been notified by the plaintiff of a loss sustained by her, informed the company thereof, and received from it a letter stating that its general agent would be on in a few days and attend to the matter. Subsequently, and before the expiration of twenty days from the loss, plaintiff made due proofs of loss and presented them to the agent, who told her that he had notified the company; that its general agent would be on to settle the loss in a few days, and that she might go home and rest easy until he came. After the twenty days had expired the general agent came, and gave plaintiff to understand that if he should find the fire was not fraudulent there was no obstacle in the way of adjusting her loss; thereafter the plaintiff sent due proofs of loss, which were returned by the company on the ground that they were not furnished in time.

The policy contained a condition requiring proof of loss to be furnished within twenty days after the loss, and provided that no condition or restriction of the policy should be waived except by an express agreement in writing signed by an officer of the company.

In an action to recover upon the policy, the company set up a failure to furnish proofs of loss as a defense. *Held*, that the acts of the agent consti-

**INSURANCE**—*Continued.*

PAGE.

tuted a waiver of the conditions of the policy, and that the company could not avail itself of a breach thereof as a defense to the action. *Id.*

— *On life*—written application for—when company cannot take advantage of mistakes in.

See TAYLOR v. MUTUAL BENEFIT LIFE INS. CO. .... 53

**INTENT**—*Criminal law*—evidence of another distinct crime, for purpose of showing intent—admissibility of.

See PEOPLE EX REL. GEORGE WILLIS v. JUSTICES. .... 158

**INTEREST**—*Unliquidated demand for professional services*—*Statute* [see bill.] Interest cannot be allowed on the recovery in an action for professional legal services not liquidated, from the time of the rendition of the services. The statute fee bill, although evidence bearing upon the question as to the value and amount of the services rendered, does not determine the question as between attorney and client.

GALLUP v. PERBUE ..... 525

— *Right of jury to allow, in actions to recover damages for negligent killing*—chapter 450 of 1847—chapter 256 of 1849—chapter 78 of 1870.

See COOK v. N. Y. C. AND H. R. R. R. Co. .... 426

— *Under an agreement to share money overpaid to United States, if recovered*—interest thereon follows principal.

See BARBEY v. LUDINGTON. .... 305

— *When it commences to run on an advancement.*

See VERPLANCK v. DE WENT. .... 611

— *Written promise to pay*—when it takes the principal out of the statute of limitations.

See KINCAID v. ARCHIBALD. .... 9

**INTERLOCUTORY JUDGMENT**—*Motion for new trial after*—*Appeal* need not be taken—Code, § 268.

See BENNETT v. AUSTIN. .... 451

**INTERPLEADER**—*Action of*—of assignee in bankruptcy with creditor of bankrupt—*Jurisdiction of State courts over*—not affected by the amendment of 1874 to bankruptcy act.

See BREWERS AND MALTSTERS' INS. CO. v. DAVENPORT. .... 264

**IRREGULARITY**—*Of appointment of receiver in supplementary proceedings.* [No person can avail himself of an irregularity in the appointment of a receiver in supplementary proceedings except the judgment debtor himself.

UNDERWOOD v. SUTCLIFFE ..... 453

— *In laying assessment, under § 7 of chap. 826 of 1840*—may be corrected under § 27 of chapter 383 of 1870.

See MATTER OF HEBREW ASYLUM. .... 112

**JOINT MORTGAGES**—*Judgment against one*—how far binding on the other.

See VAN SLYCK v. NEWTON. .... 554

**JUDGE**—*Of county court*—when interested, may request judge from another county to hold court.

See MATTER OF RYERS. .... 93

**JUDGMENT**—*On accounting*—*Assumption of outstanding claim, operates as a transfer of it*—*Evidences.* 1. This action was brought by the plaintiff to recover the value of certain wood sold to the defendant, who, with one Deen, were manufacturing brick as assignees of one Horne. The wood was sold upon the agreement of the defendant to be personally responsible therefor. The defendant set up a counter-claim for bricks sold by him and Deen to the plaintiff. Upon the trial the court refused to receive in evidence a judgment recovered after the commencement of this action, in an action brought against the defendant Tuthill and Dean, as assignees, for an accounting, in which Tuthill charged himself with the price of the brick as so much money received from the plaintiff. *Held*, that the judgment should have been received in evidence, although recovered after the commencement of this

**JUDGMENT** — *Continued.*

PAGE.

action, and that as it appeared thereby that the defendant had become the owner of the claim against the plaintiff, he was entitled to set it up as a counter-claim in this action. *VAIL v. TUTTILL* ..... 81

2. — *Setting aside of* — not granted on a second motion, after denial of motion for new trial on judge's minutes.] After a motion for a new trial has been made upon the minutes of the justice before whom the action was tried, and by him denied, it is error for another justice to entertain and grant another motion to set aside the judgment on the ground of "error and manifest injustice."

A new trial can only be granted in such a case upon an appeal from the first order. *KNAPP v. POST* ..... 35

3. — *Action to set off* — effect of prior assignment of judgment.] The plaintiff recovered a judgment against the defendant Swift in January, 1868. On appeal the same was modified by the Court of Appeals, and the modified judgment was entered in plaintiff's favor on the 27th of March, 1873. In October, 1868, Swift commenced an action against the plaintiff, and on the 10th of November, 1870, a judgment in his favor was entered upon the report of a referee. Before taking up the report Swift assigned to his attorney, the defendant Burt, his claim and the said report, in payment of services rendered and to be rendered in both actions, and thereafter assigned the judgment to him.

In this action, brought by the plaintiff to have the judgment recovered by Swift set off against the one in plaintiff's favor, *held*, that the assignment vested an absolute title to the judgment in Burt, and that when plaintiff's judgment was finally entered against Swift, the latter had no judgment against him which could be set off against it.

Distinctions between rights arising under an attorney's lien upon a judgment and under an assignment thereof, and of remedy by motion and action to offset judgments, considered. *PROUTY v. SWIFT* ..... 332

4. — *Form of* — in *replevin*.] In an action to recover the possession of personal property, which has not been delivered to the plaintiff, the jury should assess the value of the property and damages for its detention, and not simply find a general verdict for damages; and the judgment in such a case should be for the recovery of the property, or the value thereof in case a delivery could not be had, together with damages for its detention.

*PHILLIPS v. MELVILLE* ..... 211

5. — *Entry of, in action against two defendants where only one answers* — *Reversal of judgment, where one appeals* — effect of — *Execution* — when set aside.] In an action against Eckert as maker and Bishop as indorser of a promissory note, the former answered and the latter suffered a default; upon the trial a judgment was entered against both for damages and costs. Upon an appeal by Eckert the General Term reversed the judgment and granted a new trial. Upon the second trial Eckert was successful and recovered judgment against plaintiff for his costs. Subsequently plaintiff issued an execution against Bishop under the original judgment, in which was included the costs. Upon a motion to set aside the execution, *held*, that upon reversal of the former judgment none existed against Bishop under which an execution could issue, and that, in any event, Bishop could not be charged with the costs incurred by the defense interposed by Eckert. *HOWK v. BISHOP* ..... 509

— *Prayer for* — sufficient, when appropriate to, though not covering all required in a proper judgment.

*See BUSS v. KOCH* ..... 299

— *Of foreclosure* — against whom it may be read in evidence.

*See MURRAY v. DEYO* ..... 3

— *Of court-martial* — review of.

*See PEOPLE EX REL. UNDERHILL v. FULLERTON* ..... 63

— *In action for foreclosure* — taking of portion of mortgaged property by city for public use — effect of — right of plaintiff (mortgagee) to the award.

*See HOOKER v. MARTIN* ..... 302

— *Recovered against one as assignee when binding on him individually* — how far binding on one who claims as co-mortgagee with such assignee individually



**JUDGMENT**—*Continued.*

PAGE.

*under a chattel mortgage, given by a party who has obtained the property by fraud.*

See *VAN SLYCK v. NEWTON* ..... 554

— *In action of replevin—liability of sureties upon undertaking given in the action—cannot be sued until execution has been returned unsatisfied.*

See *HAGER v. CLUTE* ..... 447

**JUDGMENT CREDITOR**—*Action by, against assignee in bankruptcy, to recover value of property levied on by sheriff under execution of judgment creditor and by the sheriff delivered to the assignee in bankruptcy.*

See *ANSONIA BRASS AND COPPER CO. v. PRATT* ..... 443

**JURISDICTION**—*Of court.*] On sale of real estate of lunatic, *semble*, that it is not obligatory upon the court under the Revised Statutes (2 R. S., 53, § 12), or under the act of 1864 (chap. 417), to order a reference to ascertain the truth of the facts set forth in a petition to sell the real estate of a lunatic, when it has satisfied itself of the existence of these facts and the propriety of ordering the sale by other means. *MATTER OF VALENTINE* ..... 83

— *Of State court—over action to recover assets of bankrupt—when jurisdiction of United States court exclusive—§ 2 of chap. 390 of act of congress of 1874.*

See *OLCOTT v. MACLEAN* ..... 277

— *Of State courts—over action of interpleader of assignee in bankruptcy with creditor of bankrupt—not affected by amendment of 1874 to bankruptcy act.*

See *BREWERS AND MALTSTERS' INS. CO. v. DAVENPORT* ..... 264

— *Of surrogate over claim presented by executor in his own behalf—has none, where the claim is contested—nor can a reference be ordered in such a case to determine the same, though all the parties consent thereto.*

See *SHAKESPEARE v. MARKHAM* ..... 811

— *Of Court of General Sessions of New York city—presumption as to.*

See *MATTER OF JENNINGS* ..... 810

**JURY**—*When case on increase of insurance risk should be submitted to.*] Where the defense to an action on a fire policy was that the risk was increased without the assent of the insurers contrary to the terms thereof, by reason of the premises becoming and being unoccupied, and upon the trial three witnesses called by the defendant (the insurance company) testified that they were insurance agents, and the risk was increased by the non-occupancy of the premises and no witnesses were called by the plaintiff on this point.

Defendant's counsel asked the court to direct a verdict on the ground that it was proved, without contradiction, that the risk had been increased. *Held*, that it was not error for the court to refuse so to do; that although the evidence was competent, and entitled to great weight, the jury had the right to decide the question of increase of risk upon their own views upon that question. *CORNISH v. FARM BUILDINGS FIRE INS. CO.* ..... 466

— *Action to recover damages for negligent killing—right of jury to allow interest on their verdict.*

See *COOK v. N. Y. CEN. AND HUD. R. R. R. Co.* ..... 426

**JUSTICE'S COURT**—*Summary proceedings—sufficiency of affidavit to procure summons—certificate of service of summons by constable is "due proof."*

See *PEOPLE EX REL. HUGHES v. LAMB* ..... 348

**KILLING**—*Negligent—under chap. 450 of 1847, as amended by chapter 256 of 1849—jury cannot allow interest upon, and in addition to, their verdict—chap. 78 of 1870 does not affect actions brought before, though pending at the time of, its enactment.*

See *COOK v. N. Y. CEN. AND HUD. R. R. R. Co.* ..... 426

**LABOR**—*Meaning of the word as used in the mechanic's lien law—chap. 478 of 1862.*

See *STRYKER v. CASSIDY* ..... 18

HUN—VOL. X. 82

**LACHES** — *Notice of loss under insurance policy.*] For not presenting for five months proof of loss under a policy of insurance, which provided that "in case of loss the assured shall give immediate notice thereof to the company," it was *held*, that, although the excuses offered were sufficient to exonerate the plaintiff from blame, that they could not be taken as a legal substitute for the performance of the condition requiring "immediate notice" to be given. Such condition is a precedent one, the non-performance of which precludes a recovery. Accident or misfortune happening to the party who is bound to perform such a condition, unless caused by the adverse party, will not excuse performance. *SHERWOOD v. AGRICULTURAL INS. CO.*..... 593

**LAND** — *Meaning of.*] Certain lots under water were conveyed to the relator's grantor by the city of New York, the conveyance reserving therefrom so much thereof as formed part of Stanton street, "for the use and purpose of public streets and highways," the grantee covenanting to build a wharf on that portion reserved for Stanton street and keep the same in good repair; and that the same should always be used as a public wharf, he to have and enjoy all wharfage, crantage, benefits and advantages growing or arising from the wharf so erected. *Held*, that the interest of the grantee in the wharf so erected was "land," within the meaning of that term as used in the statutes of this State relating to taxation, and was properly assessed as such thereunder. *PEOPLE EX REL. SMITH v. COMRS. OF TAXES.*..... 207

**LANDLORD AND TENANT** — *Demised premises — Alley-way — when included in — Curtilage — meaning of — when it passes — Statement of landlord as to demised premises — when admissible — Implied covenant for quiet enjoyment in lease — Eviction — Summary proceedings — Quantum meruit.*  
*See PEOPLE EX REL. MURPHY v. GEDNEY*..... 151

**LEASE** — *Demised premises — Alley-way — when included in.*] 1. The plaintiff's assignor demised to the defendant "the house No. 324 East Fifty-eighth street, in the city of New York." At the time of the demise an alley-way, some five feet in width, ran along the side of the house to a door opening thereon, and to the coal sheds in rear thereof; said alley-way being separated from the adjoining premises by a fence. At the time of the demise, the alley-way was pointed out by the lessor as a portion of the demised premises. The plaintiff, having acquired the rights of the lessor in said lease, erected a building upon the adjoining lot, of which he was the owner, which encroached upon the alley-way some forty-eight inches, thereby injuriously affecting the approach to the door and sheds, and the light and ventilation of the house. Summary proceedings having been instituted to remove the tenant for non-payment of rent; *held*,

(1) That the plaintiff had no greater rights than had his assignor, and that his right to maintain the action was not strengthened by the fact that he claimed to be the owner of the portion of the alley upon which the building was erected;

(2) That the alley-way formed a portion of the demised premises;

(3) That, by the erecting of the building thereon, the tenant was evicted from a portion of the said premises;

(4) That the plaintiff could not maintain an action to eject him for non-payment of rent. *PEOPLE EX REL. MURPHY v. GEDNEY*..... 151

2. — *Curtilage — meaning of.*] By the curtilage of a house is meant the courtyard in the front or rear, or at the side thereof, or any piece of ground lying near and enclosed and used with the same and necessary for its convenient occupation. *Id.*

3. — *When it passes.*] Upon the grant or demise of a house the curtilage or garden thereof will pass, even though the words "with the appurtenances" are not contained in such grant or demise. *Id.*

4. — *Statement of landlord as to demised premises — when admissible.*] In an action to eject a tenant it is competent to prove the statements of the landlord made at the time of pointing out the demised premises, for the purpose of identifying the subject of the lease. *Id.*

5. — *Implied covenant for quiet enjoyment in lease.*] Although a lease contains no covenant of quiet enjoyment, yet there is an implied covenant on

**LEASE**— *Continued.*

PAGE.

the part of the lessor to do no act which will evict the tenant from any substantially valuable portion of the premises. *Id.*

6. — *Eviction — Summary proceedings.*] Where a tenant has been evicted by the landlord from a portion of the demised premises of substantial value, he cannot be evicted in summary proceedings for non-payment of rent so long as such eviction continues. *Id.*

7. — *Quantum meruit.*] *Quare*, as to the right of the lessor to bring an action upon a *quantum meruit* to recover the value of the premises still occupied by the tenant. *Id.*

— *Power of common council of the city of New York to make* — § 18 of chap. 835 of 1878 — *reasonable rent under — who decides what is.*

See *SCHANCK v. MAYOR* ..... 124

— *Reservation of right of way in — action for use and occupation.*

See *FORSYTH v. HARTNETT* ..... 578

**LEASEHOLD**— *Interest in land — his pendens may be filed in an action affecting.*

See *RUCK v. LANGE* ..... 308

**LEAVE OF COURT**— *When necessary — to maintain an action to recover deficiency on a sale under the foreclosure of a mortgage.*

See *SCOFFIELD v. DOSCHER* ..... 582

**LEGACY**— *Absolute to one — remainder to another, if the property be not disposed of by first legatee — construction of will.*

See *COLT v. HEARD* ..... 189

**LICENSE**— *Hotel and tavern — Excise law — petition of twenty freeholders.*

See *PEOPLE v. HARTMANN* ..... 602

**LIEN LAW**— *Chap. 489 of 1878 — what a basis for a lien under — within what time notice must be filed.*] An entire contract for digging a cellar, erecting foundations, walls and piers and moving buildings upon such foundations and piers, and for materials furnished therefor, constitutes a basis for a lien under chapter 489 of 1878.

Under the fourth section of said act the notice is not required to be filed until sixty days after the performance and completion of the labor or final furnishing of the materials. *CHASE v. JAMES* ..... 506

— *Mechanic's — chap. 478 of 1862 — meaning of the word "labor" — Architect not entitled to lien for services.*

See *STRYKER v. CASSIDY* ..... 18

— *Mortgage taken to secure same debt secured by lien — effect of.*

See *HALL v. PETTIGROVE* ..... 609

**LIFE INSURANCE**— *Written application for — when company cannot take advantage of mistakes in.*] The plaintiff's testator having applied to an agent of the defendant for an insurance upon his life, the agent applied to the medical examiner of the company for information respecting the applicant, and was informed by him that he was the physician of the applicant and knew of all the sickness he ever had; that he knew the man and his family record well; that it was unnecessary to wait to fill out a written examination. The physician had previously stated to the applicant that he had no disease which would stand in the way of his application. The same evening the agent, applicant and physician met together, when the latter again stated that the applicant was a sound man. Subsequently, and after the risk was accepted, the written application was filled out by the agent and signed by the applicant.

In an action to recover on the policy so issued, the company defended, on the ground that the application stated that the applicant had had no ailment or disease within the last ten years, and that he had no medical attendant; while, in fact, he had a medical attendant, and had been sick for a couple of weeks, some years before, from a disease of the stomach. *Held*, that the making out of the application must be regarded as the act of the company, and it could derive no benefit or immunity from any misstatement therein contained. *TAYLOR v. MUTUAL BENEFIT LIFE INS. CO.* ..... 52

**LIMITATIONS.***See* STATUTE OF LIMITATIONS.

PAGE

**LIQUORS** — *Sale of — license — petition of twenty freeholders — not required — Hotel and tavern license.**See* PEOPLE *v.* HARTMANN ..... 602**LIS PENDENS** — *May be filed in action affecting leasehold interest in lands.**See* RUCK *v.* LANGE ..... 808

**LOAN** — *Of articles for a specific purpose — liability of borrower, if they are used for other purposes.*] 1. Plaintiff loaned a yoke of oxen to defendant to plow up a hedge. Defendant used them not only for this purpose, but also to draw stone and to load large stone upon a stone-boat. *Held*, that drawing stone and rolling them on a boat were not the uses for which the oxen were loaned, and that defendant was liable for any injuries to the cattle occasioned thereby. BUCHANAN *v.* SMITH ..... 474

2. — *Burden of proof, as to cause of injuries.*] Upon the trial of an action to recover for injuries sustained by one of the oxen, it appeared that the oxen were sound when taken by defendant; while in his control they were put to unauthorized uses; that when returned one of them was lame. Defendant gave no evidence as to how the injury was occasioned. *Held*, that it was a reasonable inference that the injury occurred while they were improperly used. *Id.*

**LOTTERIES** — *What are — 1 R. S. (Edm. ed.), 619, § 32.*] The defendant sold to the plaintiff slips of papers containing numbers, upon which, if such numbers were drawn in the Kentucky State Lottery, he would be entitled to receive certain sums of money. *Held*, that the sale of those numbers was in fact the sale of an interest in, or "portion of an illegal lottery" set on foot by the defendant, within the meaning of section 32 of 1 Revised Statutes (Edm. ed.), 619. WILKINSON *v.* GILL ..... 156

**LUNATIC** — *Sale of real estate of — jurisdiction of court — reference to ascertain facts — when necessary.*] Upon an application for the sale of the real estate of a lunatic, the petition alleged that the only real estate belonging to him was that therein described; that it was necessary for the support and maintenance of the lunatic that this should be sold, and that the committee had, subject to the approval of the court, entered into an agreement for the sale thereof at a price therein specified. Upon the presentation of the petition, an order was made, no reference having been ordered, directing the sale of the real estate to the person with whom the contract had been entered into. *Held*, that the court had jurisdiction to direct the sale to be made, and the title acquired by the purchaser thereunder could not be attacked collaterally, even though the proceedings might have been, in some respect, irregular.

*Seem*, that it is not obligatory upon the court, either under the Revised Statutes (2 R. S., 53, § 12) or under the act of 1864 (chap. 417) to order a reference to ascertain the truth of the facts set forth in the petition, when it has satisfied itself of the existence of these facts and the propriety of ordering the sale by any other means. MATTER OF VALENTINE ..... 88

— *Committee of person and estate of — cannot bring action of ejectment in his own name.*

*See* BURNETT *v.* BOOKSTAVEN ..... 481

**MALICIOUS PROSECUTION** — *And false imprisonment — action for, may be alleged in different counts of the same complaint.*] A cause of action for a false imprisonment, and a cause of action for a malicious prosecution, when both arise out of one and the same transaction, may be respectively alleged in different counts of the same complaint. BARR *v.* SHAW ..... 580

**MALPRACTICE** — *What skill required of a surgeon — Testimony of witness as to general reputation — what questions may be put to.*] One who offers himself for employment in a professional capacity undertakes,

(1) That he possesses that reasonable degree of learning and skill which is

**MALPRACTICE** — *Continued.*

PAGE.

ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community, and by those conversant with the employment, as necessary to qualify him to engage in such business;

(2) That he will use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge, to accomplish the purpose for which he is employed;

(3) That he will use his best judgment in the exertion of his skill and the application of his diligence. *CARPENTER v. BLAKE*..... 358

— *Liability of attorney for — Damages.*

*See VON WALLHOFFEN v. NEWCOMBE*..... 286

**MANDAMUS** — *Constructive service not sufficient, but an actual service of seven years in militia is required to entitle a party to his discharge.*

*See PEOPLE EX REL. PERAULT v. TURNER*..... 146

**MANSUETÆ NATURÆ** — *Aut feras natura — distinction between — in the case of the former animals, recovery cannot be had without proving previous knowledge of the vicious propensity of the animal that had done the injury.*

*See MULLER v. MCKESSON*..... 44

**MARINE INSURANCE:**

*See INSURANCE.*

**MARRIAGE** — *Not sufficient consideration to sustain release of dower by wife.*

*See CURRY v. CURRY*..... 366

— *Concealment by one just before, with intent to defraud intended wife of dower — remedy of wife.*

*See YOUNG v. CARTER*..... 194

**MARRIED WOMAN** — *Promissory note of — what constitutes a benefit to her separate estate.] 1. The defendants, husband and wife, executed a valid agreement in writing with one Adams, which provided that he should convey to them or to the husband the right to use and vend a certain patented article in Iowa and Missouri, and that the wife should convey to him a farm owned by her, he giving back a mortgage thereon for the difference between the price of the patent right and the value of the farm. Subsequently, the wife desiring to be released from her contract to convey the farm, executed a note and delivered the same to Adams, who thereafter transferred the same to the plaintiff.*

In an action on the note against the wife it was insisted that the husband was the sole purchaser of the patent right, and that the wife was merely a surety. *Held*, that as the wife had legally bound herself to convey the land to Adams, her release from such obligation was a benefit to her separate estate sufficient to sustain the note. *WILLEY v. HUTCHINS*..... 502

2. — *Pleading in action against.] Since the statutes of 1860 and 1862 the executory contract or note of a married woman is prima facie valid, and the special facts establishing her liability as a married woman need not be alleged in the complaint. Id.*

**MARSH LANDS** — *Drainage of — chap. 888, of 1869 — application for appointment of commissioners to appraise damages — Petition — contents of.] Chapter 888 of 1869, in relation to the draining of certain swamp lands in the town of Southfield, provided that if the commissioners appointed thereunder could not agree with any person as to the compensation for lands taken for making and maintaining ditches, they "should proceed to acquire title to the easement upon and across the lands of such person in the manner, so far as the same is applicable, prescribed by the general railroad law of 1850." Held, that the commissioners were not required to set forth in the petition, presented to the court for the appointment of commissioners to appraise damages, the existence of all the facts which were required by the statute to authorize their appointment, but that it rested upon the parties objecting thereto to allege and establish the non-existence of such facts.*

*MATTER OF MARSH*..... 49

**MECHANIC'S LIEN** — *Chapter 478 of 1862 — meaning of the word "labor" — Architect not entitled to lien for services.*] 1. The word "labor," as used in chapter 478 of 1862, providing that any person who shall hereafter perform any labor in building, altering or repairing any house shall, upon filing the notice required by that act, have a lien for the value of such labor, does not include the services rendered by an architect in superintending the erection of a house, and he is not entitled to a lien on the house for the value thereof. *STRYKER v. CASSIDY*..... 18

2. — *Effect of mortgage taken to secure same debt secured by mechanic's lien.*]

Plaintiff entered into an agreement with defendant, who was in possession of land under a contract, to repair a building thereon for \$3,286, and took a mortgage upon other land to secure said sum. Upon the completion of the work he filed a mechanic's lien, foreclosed the mortgage, realizing thereby \$1,025, and entered a personal judgment for deficiency.

In an action to foreclose the lien, it was claimed that by taking and foreclosing the mortgage and entering the judgment he had waived his right to the lien. *Held*, that he was entitled to pursue all the remedies he had, until he realized the amount of his claim. *HALL v. PETTIGROVE* ..... 609

— *Chap. 489 of 1878 — what a basis for a lien under — within what time notice must be filed.*

*See CHASE v. JAMES* ..... 506

**MEMORANDUM** — *Of promise to answer for debt of another — consideration must appear in — statute of frauds — effect of chap. 464 of 1863 upon.*

*See CASTLE v. BEARDSLEY* ..... 343

— *Statement by witness, of what was said to him by another witness before the trial — when the latter witness has testified that such statement was true, though forgotten at the time of the trial — admissibility of.*

*See SHEAR v. VAN DYKE* ..... 528

**MESNE PROFITS** — *Indefinite allegations as to, in complaint — sufficiency of — when not objected to before trial.*

*See CANDIE v. BURKE* ..... 850

**MILITIA** — *Discharge from — when granted — Actual, and not constructive service of seven years, required.*] The relator, who had been duly enlisted in the State militia, was expelled from his company on the 8th of April, 1873, at which time he had about a year to serve to complete the seven years of service, required by the Military Code to entitle him to a discharge. Some three years after he was, by a writ of *mandamus*, applied for by him, restored to his company and reinstated in all his rights and privileges as a member thereof, as of the said 8th of April, 1873. Subsequently he applied for a *mandamus* to compel the captain of his company to grant a discharge on the ground that he was entitled thereto, upon the expiration of one year from the said 8th day of April, 1873. *Held*, that the application was properly denied; that the statute requires actual, and not constructive, service, and that the relator was not, under the circumstances, entitled to count the time during which he was expelled from the company.

*PEOPLE EX REL. PERAULT v. TURNER* ..... 146

**MILK** — *Destruction of, when impure, by inspector appointed by board of health of Syracuse.*

*See BLAZIER v. MILLER* ..... 435

**MISJOINDER** — *One action upon two distinct undertakings — demurrer.*] Defendant Horwitz having been arrested in an action brought by the plaintiff to recover the possession of certain personal property, an undertaking was given on the third of April by the defendants Horwitz, Freudenthal and Dodds, by which they bound themselves that the defendant should, at all times, render himself amenable to process, etc., and for the payment to the plaintiffs of such sum as might be recovered against him. On the twenty-seventh of May, another undertaking was given by the defendants Dodds and Jopha, in the form and to the effect required by section 311 of the Code.

Plaintiffs having recovered judgment in the action, and an execution issued

**MISJOINDER** — *Continued.*

PAGE.

thereon having been returned unsatisfied, brought this action against all the sureties to both undertakings. *Held*, that a demurrer, interposed by the defendant on the ground of an improper joinder of separate causes of action, was proper and should be allowed. *COOK v. HORWITZ*..... 586

**MISNOMER** — *In indictment.*] Upon the arraignment of the plaintiff in error upon an indictment in which he was named "John Barnesciotta, otherwise called Garibaldi," his counsel filed the following plea: "Now comes the defendant Barnesciotta and pleads to the indictment that he is not now, and never was known by the name of Garibaldi, which he verifies," to which plea the people demurred. *Held*, (1) that a demurrer was the proper mode of disposing of the plea; (2) that the plea was properly overruled, as the true name preceded the *alias dictus*. *BARNESCIOTTA v. PEOPLE*..... 137

**MISTAKE** — *In written application for life insurance — when company cannot take advantage of.*

See *TAYLOR v. MUTUAL BENEFIT LIFE INS. CO.*..... 52

**MORE OR LESS** — *Meaning of, in contract to furnish materials.*

See *HARRINGTON v. MAYOR*..... 248

**MORTGAGE** — *For existing debt — mortgagee not bona fide purchaser — Judgment recovered against one as assignee — when binding on him individually — how far binding on his co-mortgagee.*] Where a chattel mortgage is given to secure an existing indebtedness, the mortgagee is not entitled to the rights of a *bona fide* purchaser for a valuable consideration, as against one from whom the mortgagor has obtained the property by fraud.

On January 4, 1876, Foote and Van Slyck were in possession of certain personal property, claiming to be entitled thereto by virtue of a chattel mortgage given by one Stearns to secure them for indorsements. On the twenty-seventh of January, Stearns made a general assignment to Van Slyck, who accepted the same. On the twenty-eighth of January, an action of replevin was commenced by one Barnard against Stearns and Van Slyck, as assignee, to recover the property, on the ground that Stearns had obtained the same from him by fraud. The property was seized by the sheriff, and a judgment having been recovered by Barnard, the same was delivered to him. In this action, brought by Foote and Van Slyck against the sheriff, *held* (1) that the plaintiffs were not *bona fide* purchasers for a valuable consideration; (2) that as against Van Slyck the judgment recovered in the first action was conclusive, and as against Foote, competent evidence to prove that the property belonged to Barnard at the time of the seizure. *VAN SLYCK v. NEWTON* ... 554

— *Foreclosure suit — appointment of receiver in, on application of subsequent incumbrancer — who entitled to amount collected.*

See *WASHINGTON LIFE INS. CO. v. FLEISCHAUER*..... 117

— *On other property taken to secure the same debt, as secured by a mechanic's lien — does not affect the latter — Party can pursue all remedies he has until he realises the amount of his claim.*

See *HALL v. PETTIGROVE*..... 609

— *Foreclosure of — action to recover deficiency, after judgment of foreclosure and sale — leave of court to maintain — when necessary.*

See *SCOFFIELD v. DOSCHER*..... 582

— *Relation between grantor, and grantee assuming payment of — Extension of time of payment — does not release mortgagor.*

See *MEYER v. LATROP*..... 66

— *Foreclosure — judgment in action for — taking of portion of mortgaged property by city for public use — effect of — right of plaintiff (mortgagee) to the award.*

See *HOOKE v. MARTIN*..... 302

— *Agreement by mortgagee — to extend time of payment of mortgage, made with one to whom the property has been conveyed subject to the mortgage, does not thereby release the mortgagor from his liability upon the bond executed at the time of the giving of the mortgage.*

See *PENFIELD v. GOODRICH*..... 41

**MORTGAGE** — *Continued.*

PAGE.

— *Usury — sale of mortgage — certificate of mortgagors — when it operates as an estoppel.*

See *NICHOLS v. NUSSBAUM*..... 214

— *Sale under foreclosure of — division of mortgaged premises into lots by mortgagor after giving mortgage — sheriff may sell the land (notwithstanding such division) in one tract.*

See *LANE v. CONGER*..... 1

— *On railroad — trustee taking possession of road under — right of debtor of road to offset claim against the company, falling due after change of possession — judgment of foreclosure — against whom it may be read in evidence — witness — what question calls for opinion of.*

See *MURRAY v. DEYO*..... 8

— *Sale of mortgaged premises — power of court to direct sale of all the property for benefit of subsequent incumbrancers.*

See *BARNES v. STOUGHTON*..... 14

**MOTION AND ORDER** — *Chamber order of county judge — appeal from — can only be taken after order has been entered in the county clerk's office.*

See *POOL v. SAFFORD*..... 497

— *Motion for a new trial, after interlocutory judgment — appeal need not be taken — Code, § 268.*

See *BENNETT v. AUSTIN*..... 451

— *Setting aside judgment — not granted on a second motion, after denial of motion for a new trial on the judge's minutes.*

See *KNAFF v. POST*..... 35

— *To set off judgment — distinction between remedy by motion and action.*

See *PROUTY v. SWIFT*..... 232

— *Moving party — right of, on motion, to read affidavits not served.*

See *JACOBS v. MILLER*..... 230

**MUNICIPAL CORPORATIONS** — *Award — assignments of.]* 1. Successive

assignments of an award of \$40,000 on widening and straightening Broadway, New York city, under chapter 890 of 1869. The first was for \$12,262 thereof, in writing, by one Thompson, to whom award was made as owner of the leasehold interest in several lots taken by the commissioners and confirmed by the court December 28, 1870, with covenants as to the amount thereof, and that there were no liens thereon; that he had done and would do nothing to prevent the collection of said amount, and authorized said assignee to demand, receive and receipt for the said sum, and also authorized the comptroller and chamberlain of the city to pay the same. The second, by an assignment of \$12,850 thereof, and by a mortgage for that sum on the lease and leasehold premises, on which award was made, which mortgage was recorded, mortgagee having notice of the prior assignment. The first award having been set aside and another made under a subsequent act (chap. 57 of 1871) for only \$11,544, which latter award was not sufficient to cover both assignments. *Held*, that the assignment, with the covenants therein contained, created between Thompson and his assignee the relations and all the obligations of a trust which a court of equity would enforce upon any specific award of damages which might be made for Thompson's leasehold interest in the premises, even though the award referred to and described in the assignment had been set aside. *Held*, further, that the claims of the first assignee upon the amount finally awarded were superior to those of one claiming under the mortgage and second assignment aforesaid. *SPEARS v. MAYOR*..... 160

2. — *Liability of, for excavations in streets — what precautions are required.]* The water commissioners of Cohoes, acting under authority of the law, made an excavation in one of the streets for the purpose of laying therein water pipes for general use, and placed sand and dirt in the vicinity thereof to be placed therein. At the end of the day barriers in the usual form, consisting of planks, extending from sidewalk to sidewalk, supported by barrels placed in the street, were erected to prevent vehicles from entering the street.



**MUNICIPAL CORPORATIONS** — *Continued.*

PAGE.

Subsequently, some person, without the authority or knowledge of the commissioners, removed one of the barriers, and a short time thereafter plaintiff, drove through the opening thus made, ran upon the obstructions, was thrown from his wagon and injured.

In an action by him to recover the damages sustained thereby, *held*, that the action could not be maintained, as the plaintiff had failed to show any negligence on the part of the commissioners. **PARKER v. CITY OF COHOES.** 531

— *New York city* — *failure of city authorities to designate corporation paper* — *duty of clerk of common council as to publication of municipal proceedings.*

*See* **MATTER OF DURKIN** ..... 269

— *New York city* — *redemption from tax sales in* — *chap. 274 of 1876 construed.*

*See* **PEOPLE EX REL. DOUBLEDAY v. KELLY** ..... 263.

— *Contract to furnish materials* — *words "more or less" in* — *meaning of.*

*See* **HARRINGTON v. MAYOR** ..... 248

— *Board of police commissioners* — *trial before.*

*See* **PEOPLE EX REL. SKAHAN v. POLICE COMRS** ..... 106

— *Assessment for local improvement* — *notice to parties affected by* — *when required.*

*See* **STUART v. PALMER** ..... 28

— *Assessments in the city of New York* — *valuation by ward assessors* — § 7, *chap. 826 of 1840* — *Irregularity in levying assessment* — *corrected under § 27, chap. 838 of 1870.*

*See* **MATTER OF HEBREW ASYLUM** ..... 112

— *Assessment* — *presumption of payment* — *cancellation of* — *power of court over* — *parties to* — *application for.*

*See* **MATTER OF STRIKER** ..... 306

**NATIONAL BANK** — *Contract by* — *when the fact that it is ultra vires cannot be pleaded as a defense to.*

*See* **BUSHNELL v. CHAUTAUQUE COUNTY NATIONAL BANK** ..... 378

**NEGLIGENCE** — *Liability of city for defects in highway.*] 1. In an action against the city of Utica to recover for injuries sustained in consequence of a defect in a street therein, *held*, that as the common council was declared by the charter to be commissioners of highways, the city was bound to keep the streets and walks in repair, and in case it failed so to do, and injury resulted therefrom, it was liable to the person injured for such damages as he might sustain thereby. **PEACH v. CITY OF UTICA** ..... 477

2. — *Funds in treasury to make repairs, not essential to.*] Such liability does not depend upon whether or not the city has funds in its treasury to pay for making or repairing streets, but upon the question whether or not it has the power to raise funds to defray such expenses. *Id.*

3. — *Right of persons with defective sight to travel in streets.*] The fact that a person is old, and that his sight is defective, does not deprive him of the right to travel in the streets and upon the walks, provided he uses such reasonable care and caution as a person laboring under those infirmities would ordinarily exercise. *Id.*

4. — *Notice to city* — *how proved.*] Although notice to one of the aldermen of a defect in the highway is not enough to charge the city, with notice, yet *quære*, whether notice to a considerable number of the aldermen would not be sufficient. *Id.*

— *Excavations in streets* — *liability of municipal corporation for* — *what precautions are required.*

*See* **PARKER v. CITY OF COHOES** ..... 531

**NEGLIGENT KILLING** — *Action to recover damages for* — *right of jury to allow interest* — *Chapter 450 of 1847* — *chapter 256 of 1849.*] 1. Although, in actions brought under the act of 1847, as amended by the act of 1849, authorizing the maintenance of actions to recover damages occurring by the death of any person by means of the negligence of the defendant, the jury, in rendering the verdict, may take into account the time that has elapsed

**NEGLIGENT KILLING** — *Continued.*

PAGE.

since the death as affecting the amount of the damages, yet they cannot agree upon a certain sum as damages and add to it the interest thereon from the time of the death to the time of the rendition of the verdict.

COOK v. N. Y. C. AND H. R. R. R. Co. .... 426

2. — *Chapter 78 of 1870.*] Chapter 78 of 1870 does not affect actions brought before, though pending at the time of, its enactment. *Id.*

**NEGOTIABLE CERTIFICATES** — *Of indebtedness.*] Certificates of indebtedness were issued by the trustees of a town to a contractor, based, as to their amount, on the certificates of the engineer, which were erroneous as to the price for the work done; the contractor thereafter transferred them to purchasers in good faith. *Held*, that the contractor made himself liable for the value of the certificates so transferred. *DONOHUE v. MAYOR*. .... 37

**NEWSPAPER** — *When designation of official paper, under chapter 574 of 1871, is complete* — *New York city.*

*See* MATTER OF FOSTER. .... 307

**NEW TRIAL** — *Granting of, after denial of previous motion for.*] After a motion for a new trial has been made upon the minutes of the justice before whom the action was tried, and by him denied, it is error for another justice to entertain and grant another motion to set aside the judgment on the ground of "error and manifest injustice," a new trial can only be granted in such a case on appeal from the first order. *KNAPP v. POST*. .... 35

— *Motion for, after interlocutory judgment* — *appeal need not be taken* — *Code, § 268.*

*See* BENNETT v. AUSTIN. .... 451

**NEW YORK CITY** — *Board of police commissioners* — *trial before.*] 1. On the return to a writ of *certiorari*, issued to review an order of the defendant, removing the relator from the police force of New York, it appeared that the relator was tried, upon charges preferred by his captain and sergeant, for neglect of duty, in failing to arrest two men fighting in the street, and with using improper language to Police Commissioner Erhardt when reproved therefor. The relator was brought before Commissioner Erhardt for trial, and, having been sworn, was asked what he had to say as to the charges, and testified in relation thereto. No other witnesses were examined. Erhardt made a report to the full board, and by the latter the relator was found guilty of a neglect of duty in failing to arrest the men, Erhardt not voting. *Held*, that the proceedings were regular, and that, as Erhardt was not the complainant, and was not examined as a witness, he was clearly not incapacitated from taking and reporting the testimony of the relator.

PEOPLE EX REL. SKAHAN v. POLICE COMRS. .... 106

2. — *Common Council of* — *power of, to make leases* — *reasonable rent under* — *§ 18, chap. 335 of 1873.*] Under section 18 of chapter 335 of 1873, providing that the common council of the city of New York shall have no power to "make a lease of any real estate or franchise, save at a reasonable rent;" the decision of the question as to whether or not the rent reserved is a reasonable one is left to the discretion of the common council, and, in the absence of fraud or collusion, its decision is conclusive. *SCHANCK v. MAYOR*. .... 124

— *Opening of Broadway* — *chap. 890 of 1869* — *Assignment of interest in an award* — *when trust created by* — *Successive assignment* — *Notice.*

*See* SPEARS v. MAYOR. .... 160

— *Corporation paper* — *failure of city authorities to designate* — *duty of clerks of common council, as to publication of municipal proceedings.*

*See* MATTER OF DURKIN. .... 269

— *Assessment based on valuation by ward assessors* — *§ 7, chap. 326 of 1874* — *Irregularity in levying assessment* — *corrected under § 27 of chap. 383 of 1870.*

*See* MATTER OF HEBREW ASYLUM. .... 113

— *Redemption from tax sales in* — *chap. 274 of 1876, construed.*

*See* PEOPLE EX REL. DOUBLEDAY v. KELLY. .... 283

— *Charter of* — *Chapter 574 of 1871* — *designation of official paper under* — *when complete.*

*See* MATTER OF FOSTER. .... 307

**NEW YORK CITY — Continued.**

PAGE.

- *Court of General Sessions, of — jurisdiction of — presumptions.*  
*See* MATTER OF JENNINGS ..... 810

**NEW YORK COUNTY — Surrogate of — power of, to allow costs and allowances, limited to the successful party — 2 R. S., 238, § 10 — § 9 of chap. 859 of 1870.**

- See* NOYES v. CHILDREN'S AID SOCIETY ..... 289

**NEXT OF KIN — Must be parties to an accounting by administrator.**

- See* CLOCK v. CHADEAGNE ..... 97

**NON-RESIDENT — Action by — security for costs — Code, § 238 — R. S., part 3, chap. 10, title 2, § 1.]** In this action, brought by the plaintiffs, who were non-residents, to enforce an attachment, issued in another action in which they had recovered judgment, they gave to the sheriff the bond of indemnity required by section 238 of the Code. *Held*, that they were not thereby relieved from giving security for costs, as required by part 3, chapter 10, title 2, section 1, of the Revised Statutes. *HODGES v. PORTER* ..... 244

**NONSUIT — In County Court — motion for new trial — County Court has no power to order exceptions to be first heard at the General Term.**

- See* BOYD v. CRONKRITE ..... 574

**NOTE :**

*See* PROMISSORY NOTE.

— *Or memorandum in writing — of promise to answer for debt of another — required by statute of frauds — must express the consideration, chapter 484 of 1863.*

- See* CASTLE v. BEARDSLEY ..... 343

**NOTICE — To parties affected by assessment for improvement — when required.**

- See* STEWART v. PALMER ..... 23

— *To one of the aldermen of a defect in a street, is not enough to charge the city with notice; yet quare whether notice to a considerable number of the aldermen would not be sufficient.*

- See* PEACH v. CITY OF UTICA ..... 477

— *Of lien — under chap. 489 of 1873 — within what time it must be filed.*

- See* CHASE v. JAMES ..... 506

**NOTICE OF LOSS — Laches.]** Where a policy of insurance provided that "in case of loss the assured shall give immediate notice thereof to the company," and no proofs of loss were given in the case, until after the expiration of five months. *Held*, that the policy was thereby avoided.

- SHERWOOD v. AGRICULTURAL INS. CO. .... 593

**NUISANCE — Disorderly house — what is.]** Upon the trial of an indictment for keeping a disorderly house, it is not necessary to show that it was so kept as to disturb the peace of the general public or of the particular neighborhood; it is sufficient if it be shown that it is a house of prostitution, open promiscuously, and to which large numbers of people resort for the purpose of prostitution. *BARNESCIOTTA v. PEOPLE* ..... 137

**OBSCENE LITERATURE — Chap. 777 of 1873 — age of prisoner — need not be stated in indictment — how determined.]** Under chapter 777 of 1873, prohibiting the publication of obscene literature, and providing that any person convicted thereof shall, if twenty-one years of age or upwards, be punished as therein provided, and prescribing a different punishment if he be under twenty-one years of age, it is not necessary to state the age of the prisoner in the indictment for a violation of the statute.

It is not obligatory upon the court to call witnesses to determine the age of the prisoner, but the court itself may determine his age from its own observation.

*Quare*, whether the court may, under the Constitution, examine the prisoner as to his age for this purpose.

- PEOPLE v. JUSTICES OF SPECIAL SESSIONS. .... 224

	PAGE.
<b>OFFER</b> — <i>Of judgment— trial of action before expiration of ten days— costs— Code, § 885.</i> After issue had been joined in this action, and on the seventh of February, an offer to allow judgment to be taken against him was served by the defendant; on the ninth of February the cause was regularly called in its order on the calendar, an inquest taken therein, and the costs accruing subsequent to the offer taxed in plaintiff's favor. <i>Held</i> , that, as ten days had not elapsed from the service of the offer of judgment to the time of trial, the plaintiff was entitled to disregard the offer and to tax the costs thereafter accruing. <i>HERMAN v. LYONS</i> .....	111
<b>OFFICIAL ACT</b> — <i>When evidence in favor of officer doing it— Return of execution nulla bona after action brought for failure to return.</i> See <i>BECHSTEIN v. SAMMIS</i> .....	585
<b>OFFICIAL PAPER</b> — <i>When designation of under chap. 574 of 1871 complete.</i> See <i>MATTER OF FOSTER</i> .....	307
<b>OPINION</b> — <i>What question calls for opinion of witness.</i> See <i>MURRAY v. DEYO</i> .....	8
<b>ORDER</b> — <i>For delivery of property of deceased person to executor under chap. 894 of Laws of 1870— must specify distinctly the property, delivery of which is required— Form of.</i> See <i>TILTON v. ORMEBY</i> .....	7
— <i>Appointing receiver in supplementary proceedings— title to real estate, not passed by recording of.</i> See <i>SCOTT v. ELMORE</i> .....	68
See <i>MOTION AND ORDER</i> .	
<b>PAROL EVIDENCE</b> — <i>Conversation between assured and agent of insurance company.</i> Parol evidence is admissible, to show what took place at the time, when the answers were filled out to the written interrogations put to the insured on his application for a life policy, when such answers are ambiguous. <i>HIGGINS v. PHOENIX MUT. LIFE INS. CO.</i> .....	459
— <i>Admissible to show the time of the execution and delivery of a paper, offered in evidence for the purpose of taking a case out of the statute of limitations.</i> See <i>KINCAID v. ARCHIBALD</i> .....	9
<b>PARTY IN INTEREST</b> — <i>Promissory note— denial of ownership.</i> Upon the trial of an action, brought against the maker and payee of a promissory note, the plaintiff read in evidence the note signed by the maker and indorsed in blank by the payee. The defendants set up in their answer, and offered to prove upon the trial, that the note was never transferred to the plaintiff; that he was not the legal owner or holder thereof, and that he was not the real party in interest, but that the Saratoga Bank was the real party in interest and the owner of the note. <i>Held</i> , that as these facts, if proven, would constitute no defense to the action, proof thereof was properly rejected. <i>HAYES v. SOUTHGATE</i> .....	511
<b>PERISHABLE PROPERTY</b> — <i>Transportation of, by railroad company— duty of company as to— receipt for— Value— evidence as to.</i> See <i>TIERNY v. N. Y. C. AND H. R. R. Co.</i> .....	569
<b>PERSONAL LIABILITY</b> — <i>Of public officers on contract made by them as such officers— when it exists.</i> See <i>PAULDING v. COOPER</i> .....	20
<b>PERSONAL PROPERTY</b> — <i>Form of verdict and judgment in action for the recovery of.</i> See <i>PHILLIPS v. MELVILLE</i> .....	211
— <i>Engine and boiler— when it remains such after annexation to realty— Chattel mortgage on— effect of.</i> See <i>SISSON v. HIBBARD</i> .....	420

**PLACE OF TRIAL** — *Change of — on application of sheriff.*] In an action against the sheriff and attaching creditors, praying that they be compelled to determine their conflicting claims to property attached, *held*, upon the application of the sheriff, that he was entitled, under section 124 of the Code, to have the place of trial changed to his county. *WINTJEN v. VERGES*..... 576

**PLEADINGS** — *Misjoinder.*] 1. One H. having been arrested, in an action brought by the plaintiffs, to recover the possession of certain personal property an undertaking was given by said H. and F. and D. by which they bound themselves that the said H. should, at all times, render himself amenable to process, etc., and for the payment to the plaintiffs of such sum as might be recovered against him. Afterwards another undertaking was given by D. and J. in the form and to the effect required by section 211 of the Code. Plaintiffs having recovered judgment in said action, and an execution issued thereon having been returned unsatisfied, brought an action against all the sureties to both undertakings. *Held*, that a demurrer, interposed by the defendants on the ground of an improper joinder of separate causes of action, was proper and should be allowed. *COOK v. HORWITZ*..... 586

2. — *Usury — how pleaded.*] A plea of usury must set forth the usurious agreement, the names of the parties between whom it was made, the amount loaned, the amount of usury agreed to be paid, the length of time for which the loan was agreed to be made and that the agreement was corrupt. An answer which fails to allege any agreement between the parties, but merely alleges that the plaintiff took and reserved more than seven per cent without, so far as appears, the consent of the borrower is fatally defective.

*NATIONAL BANK OF AUBURN v. LEWIS*..... 468

3. — *Malicious prosecution and false imprisonment — joinder of.*] A cause of action for a false imprisonment and a cause of action for a malicious prosecution, when both arise out of one and the same transaction, may be respectively alleged in different counts of the same complaint.

*BARR v. SHAW*..... 580

4. — *Denial of ownership, of promissory note sued upon.*] In an action against the maker and payee of a promissory note indorsed in blank, where the answer alleged that the plaintiff was not the owner and holder of the note, or the real party in interest, but some one else was, *held*, that, as these facts if proven would constitute no defense to the action, proof thereof was properly rejected. *HAYS v. SOUTHGATE*..... 511

5. — *Married woman — action on her note.*] In an action against a married woman on a promissory note, the special facts establishing her liability as a married woman need not be alleged in the complaint.

*WILLSEY v. HUTCHINS*..... 502

— *The complaint, in an action upon a promissory note, containing a description of the note, is sufficient without an averment of the consideration.*

*See UNDERHILL v. PHILLIPS*..... 591

— *Usury must be pleaded.*

*See HAYWOOD v. JONES*..... 500

— *Allegations in, relate to time of beginning suit — as to residence, in County Court.*

*See BURNS v. O'NEILL*..... 494

— *Indefinite allegation as to means profits in complaint — must be objected to before trial.*

*See CANDIE v. BURKE*..... 350

— *Admissions contained in answer — acceptance of, by plaintiff — must be of the entirety.*

*See GOODYEAR v. DE LA VERGNE*..... 587

— *Action against heir at law and next of kin — A defendant cannot be charged both as heir at law and next of kin in the same count of a complaint.*

*See ARMSTRONG v. WING*..... 250

— *Prayer for judgment sufficient, when appropriate to, though not covering all required in a proper judgment.*

*See BUES v. KOCH*..... 299

**PLEADINGS—Continued.**

PAGE.

— *Complaint for goods sold—non-payment of claim need not be alleged.**See* SALISBURY v. STINSON..... 242

**PLEA IN ABATEMENT**—*For misnomer.*] Upon the arraignment of the plaintiff in error upon an indictment in which he was named "John Barnesciotta, otherwise called Garibaldi," his counsel filed the following plea: "Now comes the defendant Barnesciotta and pleads to the indictment that he is not now, and never was known by the name of Garibaldi, which he verifies," to which plea the people demurred. *Held*, (1) that a demurrer was the proper mode of disposing of the plea; (2) that the plea was properly overruled, as the true name preceded the *alias dictus*.

*BARNESCIOTTA v. PEOPLE*..... 187**POLICE COMMISSIONERS**—*Board of, of New York—trial before.**See* PEOPLE EX REL. SKAHAN v. POLICE COMMISSIONERS..... 106**POLICY OF INSURANCE:**— *On real and personal property—condition as to incumbrances—policy avoided only as to the portion incumbered.**See* MERRILL v. AGRICULTURAL INS. CO..... 428— *Waiver of condition of—when acts of agents constitute a waiver of such conditions.**See* VAN ALLEN v. FARMERS' JOINT STOCK INS. CO..... 397  
*See* INSURANCE.**POLLUTION**—*Of stream of water—remedy of party aggrieved by.**See* SEAMAN v. LEE..... 607

**POWERS**—*Must be either beneficial or in trust—when invalid.*] One clause of a testator's will was as follows, viz.: "I give full power and authority and control to sell my property in Brooklyn to my sister, Mrs. Conboy, and to receive the rent of it—house No. 885, Pacific street, Brooklyn." *Held*, that the testator created, if any thing, a power, but as such power was neither beneficial or in trust, it was not authorized by the Revised Statutes, and that as to such real estate he died intestate. *JENNINGS v. CONBOY*..... 77

**POWER OF ATTORNEY**—*Construction of.*] Defendant executed a power of attorney, by which he appointed one Packard his "true and lawful attorney for me and in my name, and place, and stead, to draw and indorse any check or checks, promissory note or notes on any bank in the city of New York, in which I have an account, and especially in the Irving National Bank of said city, and to do any and all matters and things connected with my account in said Irving National, or any other bank in said city which I myself might or could do," etc. *Held*, that Packard was not authorized thereby to draw or indorse any check or note, except such as were payable at a bank in which the defendant had an account.

*CRAIGHEAD v. PETERSON*..... 596

**POWER OF THE COURT**—*To inquire as to adequacy of provisions in lieu of dower.*] *Quære*, as to the power of the court to inquire into the adequacy of a provision made in an ante-nuptial agreement, for the wife in lieu of dower, and as to the extent to which such inquiry can be carried.

*CURRY v. CURRY*..... 366— *To order cancellation of an assessment.**See* MATTER OF STRIKER..... 308— *On sale of mortgaged premises—to direct sale of all the property for benefit of subsequent incumbrancers.**See* BARNES v. STOUGHTON..... 14**PRACTICE**—*Right of moving party, on motion, to read affidavits not served.*]

1. Upon the hearing of a motion made by the plaintiff for the continuance of a temporary injunction, granted in the action, he will not generally be allowed to read additional affidavits, which are not in answer to new matter introduced by the defendant, but merely corroborative of the facts set forth in the moving papers. *JACOBS v. MILLER*..... 280

**PRACTICE — Continued.**

PAGE.

2. — *When action is discontinued.*] Where an order is entered discontinuing an action on payment of costs, the defendant may, so long as the costs are unpaid, enter judgment therefor and issue execution thereon, or he may disregard the order and proceed with the action as though it had never been entered. *SUTPHEN v. LASH* ..... 120

3. — *Demurrer — to plea of misnomer in indictment.*] Upon the arraignment of the plaintiff in error upon an indictment in which he was named "John Barnesciotta, otherwise called Garibaldi," his counsel filed the following plea: "Now comes the defendant Barnesciotta and pleads to the indictment that he is not now, and never was, known by the name of Garibaldi, which he verifies," to which plea the people demurred. *Held*, (1) that a demurrer was the proper mode of disposing of the plea; (2) that the plea was properly overruled, as the true name preceded the *alias dictus*.  
*BARNESCIOTTA v. PEOPLE* ..... 137

4. — *Injunction — against a court-martial.*] A court of equity will not restrain by injunction a court-martial from trying one subject to its jurisdiction when he alleges as the only ground for such injunction that he has already been tried upon the same charge, and that he apprehends that the second trial will be unfairly conducted. *PERAULT v. RAND*..... 222

5. — *Motion for a new trial, after interlocutory judgment — appeal need not be taken — Code, § 268.*] After the entry of an interlocutory judgment or decree, not authorizing a final judgment, but directing further proceedings before a referee or otherwise, a motion for a new trial, on a case and exceptions, may be made under section 268 of the Code, without taking any appeal from such judgment or decree.

*Semble*, such motion cannot be made in case of a trial before a referee.

Such motion does not stay proceedings under the interlocutory judgment or decree. *BENNETT v. AUSTIN*..... 451

6. — *Indefinite allegations as to — must be objected to before the trial.*] When, in an action of ejectment, it appears from the complaint that the plaintiff claims to recover the value of the rents and profits of the premises during the time they have been unlawfully withheld by the defendant, it is too late, on the trial, to object to the form and want of particularity and certainty with which the allegations relating thereto are made.

*CANDER v. BURKE* ..... 350

7. — *Proceedings to determine conflicting claims to real property — when maintainable.*] One who is in possession of real property, claiming title thereto, is possessed of a sufficient estate therein to maintain proceedings under the Revised Statutes to determine conflicting claims thereto.

*SCHROEDER v. GURNEY*..... 418

8. — *Bill quia timet.*] Courts of equity will generally give relief under a bill *quia timet*, only where it is necessary to resort to extrinsic evidence not of record, to show the invalidity of the instrument constituting the apparent cloud upon the title. *Id.*

— *On nonsuit in County Court — Motion for new trial — County Court has no power to order exceptions to be first heard at the General Term.*

*See BOYD v. CRONKRITE*..... 574

— *Judgment — entry of, in action against two defendants, when only one answers — reversal of judgment where one appeals — effect of.*

*See HOWE v. BISHOP* ..... 509

— *Admission contained in answer — acceptance of, by plaintiff — must be of the entirety.*

*See GOODYEAR v. DE LA VERGNE*..... 587

— *Within what time application must be made for discharge of bankrupt — § 29 of bankrupt act.*

*See WOOD v. HAZEN* ..... 362

— *Removal of actions to United States court under chap. 137 of 1875 — accerments in petition not binding upon court.*

*See CLARK v. OPDYKE*..... 383

**PRACTICE** — *Continued.*

PAGE.

- *Insolvent discharge under State law — petition for — relinquishment by petitioning judgment creditor of the security for his debt — proper form of.*  
*See AUGSBURY v. CROSSMAN* ..... 389
- *Action to recover damages for negligent killing — right of jury to allow interest on their verdict.*  
*See COOK v. N. Y. C. AND H. R. R. R. Co.* ..... 426
- *Summary proceedings — sufficiency of affidavit to procure summons in — certificate of service of summons by constable — is due proof thereof.*  
*See PEOPLE EX REL. HUGHES v. LAMB* ..... 348
- *Supplementary proceedings — power of referees to adjourn hearing in.*  
*See KAUFMAN v. THRASHER* ..... 438
- *Supplementary proceedings — receiver in — powers of — irregularity in appointment of — who may take advantage of.*  
*See UNDERWOOD v. SUTCLIFFE* ..... 453
- *Replevin — liability of sureties upon undertaking given in — action not maintainable until after execution returned unsatisfied.*  
*See HAGER v. CLUTE* ..... 447
- *Chamber order of county judge — appeal from — can only be taken after order has been entered in the county clerk's office.*  
*See POOL v. SAFFORD* ..... 497
- *Foreclosure of mortgage — action to recover deficiency, after judgment of foreclosure and sale — leave of court to maintain — when necessary.*  
*See SCOFFIELD v. DOSCHER* ..... 583
- *Costs — readjustment of — when granted — what directions as to, proper.*  
*See MURDOCK v. ADAMS* ..... 566
- *Surrogate's Court — examination as to effects of deceased person — chap. 894 of 1870 — order for delivery of property to executor — proper form of — must specify distinctly the property, delivery of which is required.*  
*See TILTON v. ORMEBY* ..... 7
- *Sale of mortgaged premises — power of court to direct sale of all the property, for benefit of subsequent incumbrancers.*  
*See BARNES v. STOUGHTON* ..... 14
- *Town hall — purchase of site for — application to supervisors therefor, under § 20, chap. 483 of 1875 — what is proper.*  
*See BERGEN v. GURNA* ..... 11
- *New trial — setting aside judgment — not granted on a second motion, after a denial of a motion for a new trial on the judge's minutes.*  
*See KNAPP v. POST* ..... 35
- *Notice to parties affected by assessment for local improvement — when required.*  
*See STUART v. PALMER* ..... 23
- *Decree directing sale of real estate conveyed by debtor in fraud of creditor — proper form of.*  
*See VAN WYCK v. BAKER* ..... 39
- *After service of an offer to allow judgment to be taken, but before the expiration of ten days from such service, on the cause being reached on the calendar, plaintiff can disregard such offer, try the cause and tax the costs thereafter accruing.*  
*See HERMAN v. LYONS* ..... 111
- *Distinctions between rights arising under an attorney's lien upon a judgment and under an assignment thereof, and of remedy by motion and action to offset judgments, considered.*  
*See PROUTY v. SWIFT* ..... 233
- *Replevin — form of verdict and judgment in an action for the recovery of personal property.*  
*See PHILLIPS v. MELVILLE* ..... 211
- *Lis pendens — may be filed in action affecting leasehold interest in lands.*  
*See RUCK v. LANGE* ..... 303



**PRACTICE — Continued.**

PAGE.

— <i>Discontinuance of action — what must be shown upon application for, on ground that it has been settled.</i>	
<i>See CONNORS v. TITUS</i> .....	285
— <i>Amendment to answer setting up usury — allowance of — character of defense not considered.</i>	
<i>See BARNETT v. MEYER</i> .....	109
— <i>Alimony — when paid from date of application for, instead of from date of order granting it.</i>	
<i>See COLLINS v. COLLINS</i> .....	272
— <i>Action by attorney for services — defense that charges are exorbitant and oppressive — reference not usually ordered in such cases.</i>	
<i>See MARTIN v. WINDSOR HOTEL CO.</i> .....	304
— <i>Foreclosure sale — division of mortgaged premises into lots by mortgagor after giving mortgage — when sheriff may sell (notwithstanding such division) the land in one tract.</i>	
<i>See LANE v. CONGER</i> .....	1
— <i>Action to recover assets of bankrupt — in what court it must be brought — jurisdiction of State court — of United States District Court — when exclusive — § 2 of chap. 890 of 1874.</i>	
<i>See OLCOTT v. MACLEAN</i> .....	277
— <i>Contract of sale — specific performance — when ordered, notwithstanding failure of plaintiff to tender deed — Prayer for judgment — sufficient, when appropriate to, though not covering all required in, a proper judgment.</i>	
<i>See BUESS v. KOCH</i> .....	299
— <i>Reference — order of, to ascertain damages arising from an injunction — right of party injured to such order.</i>	
<i>See WATERBURY v. BOWKER</i> .....	262
— <i>Venus — change of, for convenience of witnesses — motion for, granted when opposing affidavit simply sets forth facts tending to show that the facts sought to be established by defendant's witnesses have no existence.</i>	
<i>See WIGGIN v. PHELPS</i> .....	187
— <i>Complaint for goods sold — non-payment of claim — need not be alleged — Demurrer.</i>	
<i>See SALISBURY v. STINSON</i> .....	242
<b>PREFERENCE — In payment of deposits made by savings banks given by § 48, chap. 371 of 1875 — Receiver of bank — when estopped from questioning acts of officers of.</b>	
<i>See ROSENBAUGH v. MANUF. AND BUILDERS' BANK</i> .....	148
<b>PRESUMPTION — Of payment of an assessment.</b>	
<i>See MATTER OF STRIKER</i> .....	306
— <i>As to jurisdiction of Court of General Sessions of New York city.</i>	
<i>See MATTER OF JENNINGS</i> .....	810
<b>PRINCIPAL AND AGENT — Code, § 899.] Although under section 899 of the Code, a party to an action may testify as to a conversation between the deceased and a third person which he has overheard, so long as such testimony is limited to what was neither a personal transaction nor communication between the witness and the deceased, yet this rule does not prevail when such third person is an agent for, and is acting in the interest of the witness. HEAD v. TEETER.</b>	
.....	548
— <i>Factor selling under del credere commission — rights of assignee or receiver of.</i>	
<i>See FRANKLYN v. SPRAGUE</i> .....	569
— <i>Insurance company — when estopped by acts of its agent.</i>	
<i>See GATES v. PENN. FIRE INS. CO.</i> .....	489
— <i>Agent of insurance company — powers of — when company bound by acts of — waiver of condition of policy.</i>	
<i>See VAN ALLEN v. FARMERS' JOINT STOCK INS. CO.</i> .....	397

**PRINCIPAL AND INTEREST**—*When interest follows principal—agreement to share money overpaid to the United States in case of its recovery.*

*See* BARREY v. LUDINGTON ..... 305

**PRINCIPAL AND SURETY**—*Relation between grantor and grantee assuming payment of mortgage—extension of time of payment.*] Although when a grantee of property assumes the payment of a mortgage then existing thereon, he becomes, in equity, as between himself and the grantor, the principal debtor, and the grantor is regarded as a surety; yet, the rights of the mortgagee are not affected thereby, and as to him the mortgagor still continues to be the principal debtor, and the liability of the latter to him is not affected by an extension of the time of payment of the mortgage given to the grantee. MEYER v. LATHROP..... 66

— *Conveyance subject to mortgage—effect of agreement by mortgagees to extend time of payment—does not release the original mortgagor.*

*See* PENFIELD v. GOODRICH..... 41

**PROBATE OF WILL**—*Admissions of devisees—when admissible.*] 1. The appellants contested before the surrogate the probate of the will of one Horn, on the ground of incapacity and of fraud and undue influence. The testator devised the property to a granddaughter and her husband, jointly. Upon the hearing, the counsel for contestant proposed to prove statements of the granddaughter, made at or about the time of making the will, that the testator ought to leave all his property to herself and husband; that she had consulted a physician as to his mental capacity; that he would do whatever she asked him; that they meant to have the property; which evidence was, upon the objection of the counsel for the proponents, rejected. *Held*, that this was error. HORN v. PULLMAN..... 471

2. — *Improper rejection of evidence by surrogate—when his judgment reversed because of.*] Where competent evidence has been rejected by the surrogate, his judgment or decree will not be reversed, unless, if such evidence had been received and a finding had been made in conformity thereupon, the court would have affirmed the decree. *Id.*

**PROFESSIONAL SERVICES**—*Action for—unliquidated demand—allowance of interest upon.*] In an action by an attorney against his client, to recover for professional services rendered by him, no bill having been presented and the demand being unliquidated, interest cannot be allowed upon the amount of the recovery from the time of the rendition of the services.

The statute fee bill, although evidence bearing upon the question as to the value and amount of the services rendered, does not determine the question as between attorney and client. GALLUP v. PERUE..... 525

— *Action by attorney for services—defense that charges are exorbitant and oppressive—reference not usually ordered in such cases.*

*See* MARTIN v. WINDSOR HOTEL CO..... 304

**PROMISSORY NOTE**—*Action upon—Title of plaintiff—denial of.*] 1. Upon the trial of this action, brought against the maker and payee of a promissory note, the plaintiff read in evidence the note signed by the maker and indorsed in blank by the payee. The defendants set up in their answer, and offered to prove upon the trial, that the note was never transferred to the plaintiff; that he was not the legal owner or holder thereof, and that he was not the real party in interest, but that the Saratoga Bank was the real party in interest and the owner of the note. *Held*, that as these facts, if proven, would constitute no defense to the action, proof thereof was properly rejected. HAYS v. SOUTHGATE..... 511

2. — *Complaint in action upon—consideration need not be alleged.*] The omission of the words "for value received," in a promissory note, is not material.

In an action upon such a note, it is not necessary to allege in the complaint, that there was any consideration therefor.

A description of the note is sufficient without an averment of the consideration. UNDERHILL v. PHILLIPS..... 591

**PROMISSORY NOTE—Continued.**

PAGE.

— *Of married woman—given on her release from a contract to convey her land, held a sufficient benefit to her separate estate to sustain an action upon it.*  
*See WILLSEY v. HUTCHINS.*..... 508

— *Usury—substitution of new note for old and usurious one—rights of bona fide holder.*  
*See SHERWOOD v. ARCHER.*..... 73

**PROOF OF SERVICE**—*Of summons in summary proceeding.*] The certificate of the constable, showing a service of the summons upon the defendant personally, by showing the original and delivering a copy thereof to him, is "due proof" of the service thereof.

*PEOPLE EX REL. HUGHES v. LAMB.*..... 348

— *Publication—city of Troy, power of common council of to direct publication of notices of tax sales.*  
*See FRANCIS v. CITY OF TROY.*..... 515

**PUBLIC OFFICER**—*Contract by—duties of, as to payment—when personally liable thereon.*

*See PAULDING v. COOPER.*..... 20

**PURCHASER:**

*See VENDOR AND PURCHASER.*

**QUANTUM MERUIT**—*Quære, where a tenant has been evicted by the landlord from a portion of the demised premises of substantial value—as to the right of the lessor to bring an action upon a quantum meruit to recover the value of the premises still occupied by the tenant.*

*See PEOPLE EX REL. MURPHY v. GEDNEY.*..... 151

**QUIA TIMET**—*Bill of—when proper.*] Courts of equity will generally give relief under a bill *quia timet*, only where it is necessary to resort to extrinsic evidence not of record, to show the invalidity of the instrument constituting the apparent cloud upon the title. *SCHROEDER v. GURNEY.*.... 418

**QUIET ENJOYMENT**—*Implied covenants for, in lease.*

*See PEOPLE EX REL. MURPHY v. GEDNEY.*..... 151

**RAILROAD**—*Mortgage—Trustees taking possession of road under—right of debtor of road to offset claim against the company, falling due after change of possession.*] 1. The Walkill Valley Railway Company having made default in the payment of the interest falling due on mortgage bonds issued by it, the plaintiffs, the trustees under the mortgage, in pursuance of the terms thereof, entered into possession of the road in May, 1873, and received the rents and tolls thereof for the benefit of the bondholders. Subsequently, the mortgage was foreclosed and the road sold to the plaintiffs. This action was brought to recover money due to the road for transporting the mails for the half year, ending December 31, 1873, received by the defendant, who had acted as agent for the road in collecting such money from the treasury department, and which he refused to pay over, he claiming to be entitled to set-off against this amount a note given by the company to him in October, 1872, due one year after date. *Held*, that as the plaintiffs' right to receive the earnings of the road became absolute in May, 1873, at which time defendant's note had not yet become due, no offset thereof could be made in this action. *MURRAY v. DEYO.*..... 3

2. — *Judgment of foreclosure—against whom it may be read in evidence.*] Upon the trial, plaintiffs were allowed, against the defendant's objection and exception, to introduce in evidence the judgment in the action of foreclosure, to which the defendant was not a party. *Held*, that this was proper; that the mortgage and decree were properly submitted to show the transfer of the title to the plaintiffs. *Id.*

3. — *Witness—what question calls for opinion of.*] Upon the trial a witness, who had been employed by one of the plaintiffs, was asked in their behalf: "For whom and in whose behalf did Mr. Burdell make that employment, if you understood?" *Held*, that the question did not necessarily call for an opinion of the witness, and was properly admitted. *Id.*

**RAILROAD — Continued.**

PAGE.

— *Perishable property—transportation of by—duty of company as to—receipt for—Value—evidence as to.*

See *TIERNY v. N. Y. CEN. AND HUD. R. R. Co.*..... 569

— *Use of highway by—consent of owner thereto—effect of—injunction.*

See *MURDOCK v. PROSPECT PARK AND C. I. R. R. Co.*..... 598

**RAILROAD BONDS**—*Issue of—statements in—Bona fide purchaser—what facts sufficient to put upon inquiry.]* A railroad company issued certain bonds designated as “consolidated first mortgage gold bonds,” the bonds referring to a mortgage from which it appeared that it was intended to substitute a portion of the bonds for first mortgage bonds already issued upon the road, and to devote the remainder thereof to the extension and completion thereof. *Held,*

(1) That the use of the word “consolidated” was sufficient to put a purchaser upon his inquiry.

(2) That as the bonds referred to the mortgage, a purchaser was bound by the statement contained in the mortgage, and that it was his duty to ascertain whether or not the holders of the old bonds were willing to make the exchange. *CAYLUS v. N. Y., K. AND S. R. R. Co.*..... 295

**READJUSTMENT OF COSTS**—*When granted—what direction as to readjustment proper.*

See *MURDOCK v. ADAMS*..... 566

**REAL ESTATE**—*Of lunatic—sale of—jurisdiction of court—reference to ascertain facts—when necessary.*

See *MATTER OF VALENTINE*..... 83

— *Sale of, under foreclosure of mortgage—division of mortgaged premises into lots by mortgagor after giving mortgage—when sheriff may sell (notwithstanding such division) the land in one tract.*

See *LANE v. CONGER*..... 1

— *Power of court to direct a sale by its officers of real estate fraudulently conveyed—Fraudulent conveyance—remedy of creditor—form of decree directing sale.*

See *VAN WYCK v. BAKER*..... 89

— *Vested equitable estate in remainder—made a legal estate by the statute of uses—Rule in Shelly's Case—does not apply where the estate in the ancestor is an equitable, and in the heir a legal one.*

See *BENNETT v. GARLOCK*..... 338

— *Annexation—of chattels to—chattel mortgage on—prevents their change from personal to real property.*

See *SIBSON v. HIBBARD*..... 420

— *Deed, description in—Survey must commence at place of beginning.*

See *ELLIOTT v. LEWIS*..... 486

**RECEIPT**—*As in good order—to railroad company for perishable property transported by it—explanable by parol evidence.*

See *TIERNY v. N. Y. CEN. AND HUD. R. R. Co.*..... 569

**RECEIVER**—*Of insurance company—as to payment of company's check.]*

A receiver must pay check drawn by company, in settlement of loss before his appointment, out of the funds on which the check was drawn, although such funds were withdrawn from the bank by the receiver before presentation of the check. *MERRILL v. ANDERSON*..... 604

— *In supplementary proceedings—powers of—irregularity in appointment of—who may take advantage of.*

See *UNDERWOOD v. SUTCLIFFE*..... 458

— *Appointment of, in foreclosure suit—on application of subsequent incumbrancer—who entitled to amount collected.*

See *WASHINGTON LIFE INS. Co. v. FLEISCHAUER*..... 117

— *In supplementary proceedings—can convey no title to the debtor's real estate, where the judgment debtor has made no conveyance to him, nor any order*

**RECEIVER** — *Continued.*

PAGE.

*has been made by the court requiring the judgment debtor to do so, or directing a sale by the receiver — Title to real estate does not pass to receiver on recording the order appointing him.*

*See* SCOTT v. ELMORE..... 68

— *Right of a person not a party to the action in which a receiver was appointed, to maintain action against him for money collected.*

*See* SHERIDAN v. JACKSON..... 89

— *Of bank — when estopped from questioning acts of officers of.*

*See* ROSENBACK v. MANUF. AND BUILDERS BANK..... 148

— *Of factor selling under del credere commission — rights of.*

*See* FRANKLYN v. SPRAGUE,..... 589

**RECORDING ACT** — *Bona fide purchaser.* | July 11, 1866, N. Case conveyed certain real estate to one Catharine M. Brierly in trust to receive the rents, and apply the same to the use of herself and B. W. Case, the premises to revert, after the death of Brierly and B. W. Case, to the issue or heirs at law of the latter, if he left any, otherwise to the heirs of the grantor.

The deed was lost soon after execution, but was afterwards found and was recorded March 1, 1875. N. Case continued in possession of the land. Brierly died in 1870, and devised her interest in the premises to B. W. Case. In 1872 N. Case, as special guardian of B. W. Case, in pursuance of an order of the County Court, conveyed the premises to the plaintiff for \$2,000, he giving back a mortgage (without any personal covenant on his part) to secure the same, payable on B. W. Case's arriving at age. Plaintiff, at the time of his purchase, knew that a former deed had been given and lost, but did not know its contents. About the same time, to perfect the record, he took a deed from N. Case individually, upon the same consideration as the deed from the special guardian — the deed being dated January 1, 1868, and recorded February 12, 1875. *Held*, (1) that the deed from the special guardian was a nullity, as the infant had no interest in the premises; (2) that the deed from Case was not entitled to priority over the trust deed, for the reason that the plaintiff was not a *bona fide* purchaser thereunder, the only consideration therefor being a mortgage not yet due.

SCHROEDER v. GURNEY..... 418

**REDEMPTION** — *From tax, in the city of New York — chap. 274 of 1876.* | Chapter 274 of 1876, providing that, at any time within one year after the passage of the act, any person might pay to the comptroller of the city of New York the amount of any tax upon property belonging to such person theretofore imposed and *then remaining unpaid*, together with interest at seven per cent per annum, for the time that such tax was imposed, only applied to cases in which the taxes had not as yet been paid to the public authorities, and did not provide for the redemption of property previously sold for the non-payment of taxes, the time to redeem which had not as yet expired. PEOPLE EX REL. DOUBLEDAY v. KELLY..... 283

**REFEREE** — *In supplementary proceedings — power of, to adjourn proceedings.*

*See* KAUFMAN v. THRASHER..... 438

**REFERENCE** — *Surrogate's Court — accounting.* | 1. Where a testator devises all the rest, residue and remainder of his estate to his executors, to carry out the trust created by his will, one of such executors may apply to the surrogate, under section 52 of 2 Revised Statutes, page 92, for an order requiring his co-executor to render and file an account as therein provided.

Where objections are filed by such applicant to the account rendered in pursuance of such an order, the surrogate of New York may, under section 6 of chapter 859 of 1870, appoint a referee to examine such account and report thereon to him. BUCHAN v. RINTOUL..... 183

2. — *On sale of real estate of lunatic.* | *Semble*, that it is not obligatory on the court, under the Revised Statutes (2 R. S., 58, § 12), or under the act of 1864 (chap. 417), to order a reference to ascertain the truth of the facts set forth in a petition to sell the real estate of a lunatic, when it has satisfied itself of the existence of these facts and the propriety of ordering the sale by other means. MATTER OF VALENTINE..... 88

**REFERENCE** — *Continued.*

PAGE.

— *Not usually ordered in actions by attorneys for services — where the defense is that the charges are exorbitant and oppressive.*

See MARTIN v. WINDSOR HOTEL CO. .... 304

— *Order of, to ascertain damages arising from an injunction — right of party injured to such reference.*

See WATERBURY v. BOKER. .... 263

**REFUNDING TAX** — *County Court has power to order, when.*

See PEOPLE EX REL. HERMAN v. SUPERVISORS. .... 545

**RELEASE** — *Of dower by wife — consideration required to sustain it — chap. 375 of 1849.*

See CURRY v. CURRY. .... 386

— *By owner of property insured, to party causing loss — effect of, on rights of insurance company paying the loss.*

See CONNECTICUT INS. CO. v. ERIE RAILWAY CO. .... 59

**REMAINDER** — *Under will — after absolute legacy to one, if the property be not disposed of by first legatee — construction of.*

See COLT v. HEARD. .... 189

— *Vested equitable estate in — made a legal estate by the statute of uses.*

See BENNETT v. GARLOCK. .... 328

**REMOVAL OF ACTIONS** — *To U. S. courts under chap. 187 of 1875.] 1. This action was brought to procure the removal of the three defendants, two of whom resided in New Jersey and one in New York, from their position as trustees under a mortgage given by the New York and Oswego Midland Railroad Company, and to prevent their acting as trustees pendente lite, on the ground that they had been guilty of certain fraudulent and collusive acts whereby the security of the bondholders had been impaired.*

The defendant Opdyke, who resided in New Jersey, applied for the removal of the action to the United States Circuit Court, on the ground, among others, that there was a controversy in the suit wholly between the plaintiff and himself, which could be fully determined between them. *Held*, that as the defendants were jointly responsible for their acts as trustees, the plaintiff was entitled to prosecute them jointly, and that there was, therefore, no controversy between the plaintiff and the defendant Opdyke which could be wholly determined between them, and that the application was, therefore, properly denied. CLARK v. OPDYKE. .... 383

2. — *Action to enjoin and restrain defendant.] The fact that the suit is brought to enjoin and restrain the defendants, is not a ground of removal under the act of 1875. Id.*

3. — *Averments in petition not binding upon court.] Under the act of Congress of 1875, providing that where there is a controversy, which is wholly between citizens of different States, and which can be fully determined as between them, either one or more of the plaintiffs or defendants may remove the suit to the Circuit Court, the averments contained in a petition for such removal are not conclusive upon the court, but the existence of the requisite facts must be ascertained by the court, and for that purpose the averments of the petition in regard to them may be controverted by the opposite party. Id.*

**RENT** — *What is reasonable, under section 18 of chapter 335 of 1878 — is left to the discretion of the common council of the city of New York; and in the absence of fraud or collusion, its decision is conclusive.*

See SCHANCK v. MAYOR. .... 124

**RENTS AND PROFITS** — *Indefinite allegations as to, in complaint in ejectment — sufficient, when not objected to before trial.*

See CANDLER v. BURKE. .... 350

**REPLEVIN** — *Form of verdict and judgment in action for recovery of personal property — Code, § 277.] 1. In an action to recover the possession of personal property, which has not been delivered to the plaintiff, the jury should assess*

**REPLEVIN** — *Continued.*

PAGE.

the value of the property and damages for its detention, and not simply find a general verdict for damages; and the judgment in such a case should be for the recovery of the property, or the value thereof in case a delivery could not be had, together with damages for its detention. *PHILLIPS v. MELVILLE* .. 211

2. — *Action of — judgment in — liability of sureties upon undertaking given in.*] Where, in an action of replevin, the plaintiff recovers a judgment for the possession of the property with damages for its detention, and for a fixed sum in case a return cannot be had, he cannot maintain an action against the sureties to an undertaking, given by the defendant, in pursuance of section 211 of the Code, until an execution has been issued to the sheriff in pursuance of the judgment and the same has been duly returned unsatisfied.

*HAGER v. CLUTE*..... 447

**REPUTATION :**

*See* GENERAL REPUTATION.

**RES ADJUDICATA** — *Ejectment.*] 1. In an action of ejectment the defendants set up in their answer that the premises in question, together with others, were conveyed to the plaintiff by their ancestor, Enos Burke, in pursuance of an agreement by which plaintiff was to advance to him \$7,200; that Burke was to occupy and cultivate the same for his own benefit; that upon receipt of the said sum, with interest, plaintiff was to account and reconvey the premises to Burke; that such repayment had been made, and they therefore demanded an accounting and a reconveyance.

The plaintiff alleged in his reply, and subsequently proved upon the trial, that a prior action had been commenced by the said defendants against the plaintiff, in which they claimed that the plaintiff made an arrangement with Burke, by which he was to advance money to the latter and take a conveyance of the premises in question, with others, as security for the repayment thereof; that Burke was to remain in possession; that he, until his death, and thereafter the defendants had continued so to do; that the full amount due the plaintiff herein had been paid, whereupon they demanded an accounting and reconveyance; that judgment was entered therein in favor of the present plaintiff, holding that the conveyance was an absolute and unconditional deed, and not a mortgage or security for any loan made to Burke, and that the title to the premises was vested absolutely in the plaintiff herein.

Upon the trial of this action, *held*, that the cause of action in the former suit and the defense set up in the answer in this case were in substance the same, and that the judgment in the former action was a bar to the defense set up in the answer herein. *CANDEE v. BURKE*..... 350

2. — *Insolvent's discharge.*] Where, upon an application made by an insolvent debtor for a discharge, it appears that a similar application has already been made to one of the judges of the Court of Common Pleas of the city of New York, and having been fully heard, has been decided against him upon the merits, *held*, that the matter should be regarded as *res adjudicata* and the application denied. *MATTER OF ROBERTS*..... 248

**RESERVATION** — *Of right of way in lease — action for use and occupation.*

*See* FORSYTH v. HARTNETT ..... 578

**RESIDENCE** — *County Court — allegations as to defendant's residence — where an action is brought in — what sufficient — Allegations in pleadings — relate to time of beginning suit.*

*See* BURNS v. O'NEIL ..... 494

**REVERSAL** — *Of judgment — entered in an action against two defendants where only one answered and only one appeals — effect of, as to judgment against party in default.*

*See* HOWE v. BISHOP..... 509

**REVISED STATUTES** — 1 R. S. (Edm. ed.) 619, § 32 — *Lotteries.*] 1. The defendant sold to the plaintiff slips of papers containing numbers, upon which, if such numbers were drawn in the Kentucky State Lottery, he would be entitled to receive certain sums of money. *Held*, that the sale of those num-

**REVISED STATUTES — Continued.**

PAGE.

bers was, in fact, the sale of an interest in, or "portion of an illegal lottery," set on foot by the defendants within the meaning of section 82 of 1 Revised Statutes (Edm. ed.), 619. *WILKINSON v. GILL*..... 156

2. — 2 R. S., 53, § 12 — *Sale of lunatic's estate — Reference.*] *Semble*, that it is not obligatory on the court under, to order a reference to ascertain the truth of the facts set forth in a petition to sell the real estate of a lunatic when it has satisfied itself of the existence of these facts (that a sale was necessary for the support and maintenance of the lunatic) and the propriety of ordering the sale by other means. *MATTER OF VALENTINE*..... 83

3. — 2 R. S., 92, § 52 — *Accounting — Surrogate's Court.*] Where a testator devises all the rest, residue and remainder of his estate to executors, to carry out the trust created by his will, one of such executors may apply to the surrogate, under section 53 of 2 Revised Statutes (92), for an order requiring his co-executor to render and file an account as therein provided.

*BUCHAN v. RINTOUL*..... 183

4. — 2 R. S., 114, § 9 — *Statute of limitations.*] A surrogate cannot entertain proceedings instituted by one of the next of kin of a deceased person against an administrator, to enforce the payment of a distributive share of the estate of the deceased, when such proceedings are not commenced before the expiration of the time within which the distributee might have brought an action under section 9 of 2 Revised Statutes, 114. *CLOCK v. CHADEAGNE*.. 97

5. — 2 R. S., 238, § 10 — *Costs — Surrogate's Court.*] This statute, providing that "the surrogate may award costs to the party in his judgment entitled thereto, to be paid either by the other party personally or out of the estate," authorizes the surrogate to award costs to the successful party only, and he has no power to award costs to the defeated contestants.

*NOYES v. CHILDREN'S AID SOCIETY*..... 289

— 2 R. S., 620, § 1 — *Requiring security for costs to be filed by non-residents, is not fulfilled by their giving a bond of indemnity under section 238 of the Code.*

*See HODGES v. PORTER*..... 244

— 1 R. S. (5th ed.) 906, § 5 — *exemption from taxation under — effect of running highway through lot.*

*See PEOPLE EX REL. ST. JOHN'S COLLEGE v. COMRS. OF TAXES*.... 246

**REVIVAL OF ACTION —** *By executrix — right of action shown to be in her, individually — no power in court to amend pleadings upon the trial.*] After issue joined in an action, brought to recover the possession of personal property, the plaintiff died, and thereafter the action was revived in the name of his widow as his executrix. Upon the trial it appeared that the husband had no title to the property, but that the same was owned by the wife in her own right. *Held*, that the court had no power to amend the summons and complaint by striking out the word "executrix," and thus allow the plaintiff to recover by virtue of her own title to the property. *PHILLIPS v. MELVILLE*, 211

**RIGHT OF WAY —** *Reservation of, in lease — action for use and occupation.*

*See FORSYTH v. HARTNETT*..... 573

**RIPARIAN OWNER —** *Rights of user of stream — pollution of stream by one — remedy of party aggrieved.*

*See SEAMAN v. LEE*..... 607

**RISK —** *Increase of — when case on that question should be submitted to the jury.*

*See CORNISH v. FARM BUILDING INS. CO*..... 466

**SALE —** *Of mortgaged premises — power of court to direct sale of all the property, for benefit of subsequent incumbrancers.*] 1. In an action to foreclose a mortgage, upon the written application by the owner of the equity of redemption, and of all the parties to the action, including all persons who, at the time of the filing of the *lis pendens*, had liens upon the property, subsequent to that of the plaintiff, the court may order that all the premises be sold in parcels (though a portion thereof is of sufficient value to pay up the amount due the plaintiff), not only for the benefit of the plaintiff, but also for that of all subsequent incumbrancers and the owner of the equity of redemption.

*BARNES v. STOUGHTON*..... 14



**SALE** — *Continued.*

PAGE.

2. — *Of land — title to cannot be transferred except under statutory power.*]  
The Supreme Court has no power to effect a transfer of the title to land by directing a sale thereof by its officers, except in special cases authorized by the statutes of the State. *VAN WYCK v. BAKER* ..... 39
- *Of real estate of lunatic — jurisdiction of court — reference to ascertain facts — when necessary.*  
*See MATTER OF VALENTINE* ..... 83
- *Under foreclosure — division of mortgaged premises into lots by mortgagor after giving mortgage — when sheriff may sell (notwithstanding such division) the land in one tract.*  
*See LANE v. CONGER* ..... 1
- *Contract of — when title passes.*  
*See MORREY v. MEDBURY* ..... 540

**SAVINGS BANKS** — *Deposits made by — preference in payment of, given by § 48, chap. 371 of 1875.* 1. Section 48 of chapter 371 of 1875, providing that all the assets of any insolvent bank shall, after the payment of its circulating notes, be applied to the payment of any moneys deposited with it by any savings corporation, applies only to deposits, properly so called, and not to any other form of indebtedness.

*ROSENBAACK v. MANUF. AND BUILDERS' BANK* ..... 148

2. — *Receiver of bank — when estopped from questioning acts of officers of.*]  
The receiver of an insolvent savings bank applied, under said section, for an order directing the receiver of the M. and B. Bank to pay over a sum of money, the amount of a call loan alleged to have been made by the unauthorized acts of the officers of the savings bank in converting a deposit for that amount into a loan to the M. and B. Bank. *Held*, that as the savings bank had received collateral security for the loan, and payments on account of the principal and interest thereof from the M. and B. Bank, the receiver could not now repudiate the whole transaction and treat the loan as a deposit within the meaning of said section. *Id.*

**SECURITY FOR COSTS** — *In an action by a non-resident, giving the bond of indemnity required by Code, § 288 does not relieve from giving security for costs required by R. S., part 3, chap. 10, title 2, § 1.*

*See HODGES v. PORTER* ..... 244

**SERVICE** — *In militia — actual, not constructive, of seven years required to entitle party to a discharge.*

*See PEOPLE EX REL. PERAULT v. TURNER* ..... 146

— *Rendered by one member of a family to another — recovery for — when proper.*

*See MARKEY v. BREWSTER* ..... 16

**SET-OFF** — *Action to set off judgment — effect of prior assignment of judgment.*

*See PROUTY v. SWIFT* ..... 282

**SETTLEMENT** — *Of loss with insurance company — check of company — withdrawal of money by the receiver of the company, before presentation of the check.*] A life insurance company settled a loss accruing under a policy issued by it, and delivered a check for the amount to the claimant, drawn upon the United States Trust Company, where the company then had a deposit largely in excess of the amount thereof. The claimant indorsed, upon the back of the check, a receipt in full for all demands under the policy. Before indorsement and presentation of the check a receiver of the company was appointed, who withdrew all the funds from the trust company. *Held*, that the claimant was entitled to have the amount of such check paid by the receiver out of the funds so withdrawn.

*MERRILL v. ANDERSON* ..... 604

— *Of action — what sufficient to establish it, where application for its discontinuance is made on that ground.*

*See CONNOR v. TITUS* ..... 285

**SHELLY'S CASE** — *Where an estate in the ancestor is an equitable and in the heir a legal one.* The rule in Shelly's Case does not apply where the estate in the ancestor is an equitable and that in the heir a legal one.

**BENNETT v. GARLOCK** ..... 328

**SHERIFF** — *Action against, for failure to return execution—return of, nulla bona after commencement of action—effect of.* 1. After the commencement of an action, brought against the sheriff for a failure to return an execution within sixty days, he returned the same indorsed *nulla bona*. Upon the trial the plaintiff proved the issuing of the execution, and its return and indorsement after the commencement of the action. *Held*,

That as the return was made by a public officer of an official act he was bound by law to make, it was evidence in favor of the officer making it.

That its admissibility was not affected by the fact that it was made after the commencement of the action.

That as the plaintiffs did not contradict the return, he was entitled to recover only nominal damages. **BECHSTEIN v. SAMMIS** ..... 595

2. — *Action against sheriff and others—right of, to remove it to his own county—Code, § 124.* The plaintiffs having purchased a quantity of sugar from H. & D., of New York, the price thereof, while in plaintiffs's hands, was attached by the sheriff of New York, under an attachment issued in an action against H. & D. Subsequently one V. brought an action against the plaintiffs, to recover the price of the sugar, claiming that he was the owner thereof, and that H. & D. were merely his agents to sell the same. This action was brought by the plaintiffs, in the county of Kings, against the sheriff and the attaching creditors and V., praying that they might be compelled to determine their conflicting claims to the sugar between themselves. *Held*, upon the application of the sheriff, that he was entitled, under section 124 of the Code, to have the place of trial changed to the county of New York. **WINTJEN v. VERGES** ..... 576

— *Action against, by judgment creditor, to recover the value of property levied on by sheriff under execution of such creditor, and by the sheriff delivered to the assignee in bankruptcy of the debtor.*

*See* **ANSONIA BRASS AND COPPER CO. v. PRATT** ..... 443

**SIGNATURE** — *Forgery—opinion of experts as to simulation of signature—comparison of handwritings.*

*See* **MILES v. LOOMIS** ..... 372

**SKILL** — *Malpractice—what skill required of a surgeon.*

*See* **CARPENTER v. BLAKE** ..... 858

**SOCIETIES** — *Unincorporated—liability of members of—how terminated.*

*See* **PARK v. SPAULDING** ..... 138

**SPECIFIC PERFORMANCE** — *Agreement must be certain and definite.*

A decree of specific performance of an agreement to leave property by will, in consideration of the support and maintenance of the testator during his natural life, will be refused, where the terms and provisions of the agreement are not certain and definite. **SHAKESPEARE v. MARKHAM** ..... 311

— *Of contract of sale, when ordered, notwithstanding failure of plaintiff to tender deed.*

*See* **BUESS v. KOCH** ..... 299

**SPRING** — *Right to use water from, on another's land.*

*See* **MERRILL v. CALKINS** ..... 495

**"STANDING DETACHED"** — *Meaning of, in policy of insurance—evidence as to their meaning among insurance men—inadmissible.*

*See* **HILL v. HIBERNIA INS. CO.** ..... 26

**STATE COURTS** — *Jurisdiction of—over action of interpleader of assignee in bankruptcy with creditor of bankrupt—not affected by amendment of 1874 to bankruptcy act.*

*See* **BREWERS AND MALTSTERS' INS. CO. v. DAVENPORT** ..... 264

**STATE JURISDICTION** — *Assessment for taxation — what property subject to — extent of the State authority over regulation of commerce with foreign States — duties on imports and exports.*

*See* **PEOPLE EX REL. HANEMAN v. COMRS. OF TAXES** ..... 255

**STATE INSOLVENT LAW** — *When suspended by bankruptcy act of 1867 — Petition for discharge under State law — Relinquishment by petitioning judgment creditor, of the security for his debt — form of.*

*See* **AUGSBURY v. CROSSMAN** ..... 889

**STATUTES** — 1840, chap. 826, § 7.] It is a sufficient compliance with the requirements of section 7 of this act, providing that the commissioners or assessors for making estimates and assessments for any improvements in the city of New York, authorized by law to be assessed upon the owners and occupants of houses and lots shall, in no case, assess any house or lot for more than one-half the value of the same, as valued by the ward assessors in which the same is situated; that such house or lot has been valued by the ward assessors at any time previous to the imposition of the assessment.

**MATTER OF HEBREW AYLUM** ..... 112

— 1847, chap. 197, and 1849, chap. 187, authorizing the erection of a town hall by the town of New Utrecht and limiting the amount to be expended therefor are not a restriction upon § 20 of chap. 482 of 1875.

*See* **BERGEN v. GUENA** ..... 11

— 1847, chap. 450, as amended by chap. 256 of 1849 — *Right of jury to allow interest — in actions brought under, for negligent killing.*

*See* **COOK v. N. Y. C. AND H. R. R. Co.** ..... 426

— 1848, chap. 40 — *Trustees — action for failure to file report.*] Under section 12 of this act, providing that upon a failure to file the report required by the act, "all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made," each creditor of the company may maintain a separate action to recover the debt due him from the company, and it is not necessary that all the creditors should join in one action.

**WILES v. SUYDAM** ..... 578

— 1849, chap. 157, and 1847, chap. 197, authorizing the erection of a town hall by the town of New Utrecht and limiting the amount to be expended therefor are not a restriction upon § 20, of chap. 482 of 1875.

*See* **BERGEN v. GUENA** ..... 11

— 1849, chap. 256 — *amending chap. 450 of 1847 — Right of jury to allow interest in actions brought under for negligent killing.*

*See* **COOK v. N. Y. C. AND H. R. R. Co.** ..... 426

— 1849, chap. 875 — *Release of dower by wife.*] This act, providing that all contracts made between persons in contemplation of marriage, shall remain in full force after such marriage takes place, does not change the rule that the ante-nuptial contract of a woman that she will not claim her dower in the event of her intended marriage, is contrary to public policy and void, and unless founded upon the consideration of some provision for her in lieu of dower, will be ineffectual both at law and in equity. **CURRY v. CURRY** .. 366

— 1857, chap. 628, § 6 — *license.*] Requiring a petition of twenty freeholders as a prerequisite to the granting of a license for the sale of spirituous liquors is repealed by section 4 of chapter 175 of 1870, as amended by section 2 of chapter 549 of 1873. The provisions of said act, forbidding the granting of licenses to persons not having sufficient ability to keep a tavern, and not having the necessary accommodations to entertain travelers, is still in force.

**PEOPLE v. HARTMANN** ..... 602

— 1862, chap. 478 — *Meaning of word "labor," as used in — does not include services of an architect in superintending the erection of a house.*

*See* **STRYKER v. CASSIDY** ..... 18

— 1863, chap. 464 by repealing so much of the Revised Statutes as required a "note or memorandum expressing the consideration" to render a promise to answer for the debt etc., of another, valid, restored the law on this subject to the state in which it was prior to the adoption of the Revised Statutes.

*See* **CASTLE v. BEARDSLEY** ..... 348

## STATUTES — Continued.

PAGE.

— 1864, chap. 417 — *Sale of estate of lunatic — reference.*] *Semble*, that it is not obligatory upon the court under this statute to order a reference to ascertain the truth of the facts set forth in a petition to sell the real estate of a lunatic, when it has satisfied itself of the existence of these facts (that a sale was necessary for the support and maintenance of the lunatic) and the propriety of ordering the sale, by other means. *MATTER OF VALENTINE*, 83

— 1869, chap. 888 — *Drainage of marsh lands — Application for appointment of commissioners to appraise damages — Petition — contents of.*  
*See MATTER OF MARSH* . . . . . 49

— 1869, chap. 890 — *Act in relation to widening and straightening Broadway, in New York city — assignment of interest in an award thereon — when trust created thereby — Successive assignments — Notice.*  
*See SPEARS v. MAYOR* . . . . . 160

— 1870, chap. 78 — *Does not affect actions brought before, though pending at the time of its enactment.*  
*See COOK v. N. Y. C. AND H. R. R.R. Co.* . . . . . 426

— 1870, chap. 859, § 6 — *Reference by surrogate — to examine account.*] Where objections are filed by the applicant to an account rendered pursuant to an order made therefor under section 52, 2 Revised Statutes (92), the surrogate of New York may appoint a referee to examine such account, and report thereon to him. *BUCHAN v. RINTOUL* . . . . . 183

— 1870, chap. 859, § 9 — *Surrogate's Court — costs in.*] The statute providing that "the surrogate of said county (New York) may grant allowances, *in lieu of costs*, to counsel in any proceedings before him, in the same manner as now prescribed by the Code of Procedure," restricts his power to make allowances to those cases in which he is authorized to award costs under the provisions of the Revised Statutes, and he has, therefore, no power under the said act (*vide* 2 R. S., 223, § 10, *ante*) to make allowances to the unsuccessful parties in cases contested before him.  
*NOYES v. CHILDREN'S AID SOCIETY* . . . . . 289

— 1870, chap. 883, § 27 — *Irregularity in levying assessment under chap. 826 of 1840 — as exceeding in amount one-half of the value placed upon the property by the ward assessors, may be corrected under § 27 of this act.*  
*See MATTER OF HEBREW ASYLUM* . . . . . 113

— 1870, chap. 894 — *Examination as to effects of deceased person.*] Under this statute authorizing an executor or administrator to institute an inquiry as to any effects of the deceased, believed to be withheld or concealed from him, the surrogate thereunder acts judicially in conducting the examination, and the testimony receivable therein is subject to the restrictions of section 899 of the Code, prohibiting the admission of evidence given by parties interested in the proceeding as to personal transactions had with deceased.  
*TILTON v. ORMSBY* . . . . . 7

— 1871, chap. 574 — *Designation of official papers under, when complete.*  
*See MATTER OF FOSTER* . . . . . 307

— 1871, chap. 695 of — *in what cases County Court has power to act under.*] The provision of chapter 695 of 1871, authorizing the County Court, upon application of the party aggrieved, to make an order requiring the board of supervisors to refund to such person the amount collected from him, of any tax illegally or improperly assessed or levied, only applies to cases in which the assessors had no power to make the assessment, and not to cases in which they had power to act but erred in its exercise.  
*See PEOPLE EX REL. HERMANN v. SUPERVISORS* . . . . . 545

— 1873, chapter 335, § 18.] Providing that the common council of the city of New York shall have no power "to make a lease of any real estate or franchise, save at a reasonable rent;" the decision of the question as to whether or not the rent reserved is a reasonable one is left to the discretion of the common council, and in the absence of fraud or collusion, its decision is conclusive. *SCHANCK v. MAYOR* . . . . . 124

— 1873, chap. 439 — *Lien law — what a basis for a lien under — within what time notice must be filed under.*  
*See CHASE v. JAMES* . . . . . 506

**STATUTES — Continued.**

PAGE.

- 1878, chap. 777 — *Age of prisoner need not be stated in indictment under — how determined.*  
*See* PEOPLE v. JUSTICES OF SPECIAL SESSIONS..... 224
- 1874, chap. 287 — *Constitutionality of — Right of eminent domain — notice to persons affected by exercise of — Damages — measure of — assessment of — upon property benefited.*  
*See* LONG ISLAND R. R. CO. v. BENNETT ..... 91
- 1875, chap. 187 — *Removal under, of actions to United States courts — Averments in petition not binding in court.*  
*See* CLARK v. OPDYKE ..... 383
- 1875, chap. 871, § 48 — *Preference in payment of deposits made by savings banks, given by — receiver of bank, when estopped from questioning acts of officers of.*  
*See* ROSENBACK v. MANUF. AND BUILDERS' BANK ..... 148
- 1875, chap. 482, § 20 — *Application to supervisors to purchase site for town hall under — what is proper.*  
*See* BERGEN v. GUENA ..... 11
- 1875, chap. 482 — *Not a local bill — Constitutionality of — Power of board of supervisors to reduce width of highway — Notice to parties interested.*  
*See* PHILLIPS v. SCHUMACKER ..... 405
- 1876, chap. 274 — *Redemption from tax sales in the city of New York.*  
*See* PEOPLE EX REL. DOUBLEDAY v. KELLY ..... 283  
*See* REVISED STATUTES. *Also* UNITED STATES STATUTES.

**STATUTE OF FRAUDS** — *Promise to answer for the debt of another — consideration must appear in note or memorandum.*] Where a promise is made to answer for the debt, default or miscarriage of another person, the consideration thereof must appear either expressly or by necessary implication, in the note or memorandum in writing required by the statute.

Chapter 464 of 1863, by repealing so much of the Revised Statutes as required a "note or memorandum expressing the consideration" to render such a promise valid, restored the law on this subject to the state in which it was prior to the adoption of the Revised Statutes. *CASTLE v. BEARDSLEY*, 348

**STATUTE OF LIMITATIONS** — *When bar of, removed by written promise to pay interest — Code, § 110.*] 1. The plaintiff, in 1851, loaned to the defendant, her sister's husband, \$1,800, of which \$1,600 remained unpaid in the year 1861. In 1866 defendant paid \$200 thereon. In 1872, he signed and delivered to the plaintiff the following paper: "Received January, 1861, from Mrs. J. R. Kincaid, the sum of \$1,600, for which I agree to pay interest, at the rate of seven per cent per annum, from this date. Paid January, 1866, to Mrs. Kincaid on the above, \$200."

In an action to recover the amount due thereon :

*Held*, (1) that parol evidence was admissible to show the time of the execution and delivery of the paper.

(2) That, although it contained no express promise to pay the principal, yet, as it contained an explicit admission of an existing indebtedness and a promise to pay the interest thereon, that it was sufficient to remove the bar of the statute of limitations, which had run against the debt at the time of its delivery. *KINCAID v. ARCHIBALD*..... 9

2. — *How interposed on proceedings before surrogate.*] In an accounting by an administrator no written pleadings are necessary to entitle a party to the protection of the statute, but it must be set up or urged before all the evidence has been taken so that the claimant may have an opportunity to introduce evidence which may relieve him from the operation thereof.

*CLOCK v. CHADEAGNE* ..... 97

3. — *Money deposited at interest subject to draft.*] Where money is deposited with any individual, not a banker, trustee or agent, upon an agreement that he shall pay interest thereon, and that the same shall not be withdrawn except by drafts, payable thirty days after sight, no presumption of payment arises, nor will the statute of limitations run against the debt, until it is shown that drafts drawn against the said person, in pursuance of the agreement, have been presented and dishonored. *SULLIVAN v. FOSDICK* ... 178

**STATUTE OF LIMITATIONS**—*Continued.*

PAGE.

4. — *Burden of proof as to draft.*] It rests upon the party claiming the benefit of the statute to show the presentation and dishonor of such drafts. *Id.*

5. — In March, 1854, \$4,000 was deposited with one D., upon the agreement that he should pay interest thereon at the rate of six per cent per annum, and that the principal should only be withdrawn by drafts payable thirty days after sight. March 7, 1855, D. wrote to the depositor stating that he had credited him with \$240, being the interest to March 1, 1855.

In an action brought by the administrator of the depositor in 1876, *held*,

(1) That no presumption of payment arose under the statute of limitations in regard to the \$4,000, until the presentation and dishonor of drafts drawn against the same;

(2) That the letter informing the depositor that the interest due March 1, 1855, had been credited to him, did not have the effect of adding the amount thereof to the principal, so as to cause it to bear interest thereafter, nor did it make that amount then due, so that the statute of limitations would then commence to run against it. *Id.*

6. — *Does not run against remainderman.*] The defense interposed in the action was that of an adverse possession commenced in 1842. *Held*, that as the trustee under the deed in no way represented or was bound to protect the interests of the plaintiff, whose interest was subject to a life estate, the statute did not commence to run against her until her right of action accrued, upon the death of her mother, in 1871. *BENNETT v. GARLOCK*..... 328

— *Effect of bankruptcy of debtor on running of—Counter-claim, in action by assignee in bankruptcy—reply to, by assignee.*

*See VON SACHS v. KRETZ*..... 95

**STATUTES OF UNITED STATES**—1874, chap. 890, § 2—*When jurisdiction of United States court exclusive over action to recover assets of bankrupt.*

*See OLCOTT v. MACLEAN*..... 277

—1875, chap. 187—*Removal of action into United States court under—averments of petition not binding on court.*

*See CLARK v. OPDYKE*..... 383

**STATUTE OF USES**—*Vested equitable estate in remainder, made a legal estate by,*

*See BENNETT v. GARLOCK*..... 328

**STAY OF PROCEEDINGS**—*Motion for new trial—after interlocutory judgment.*] Where, after the entry of an interlocutory judgment or decree, a motion is made for a new trial on a case and exceptions under section 268 of the Code, such motion does not stay proceedings under the interlocutory judgment or decree. *BENNETT v. AUSTIN*..... 451

**STREAM OF WATER**—*Right of user by riparian owner—pollution of—remedy of party aggrieved by.*

*See SEAMAN v. LEE*..... 607

**STREETS**—*Use of, by railroad company—consent of the owner of the fee thereto—effect of.*

*See MURDOCK v. PROSPECT PARK AND C. I. R. R. Co.*..... 598

—*Liability of city for defects in—funds in treasury to make repairs not essential to liability—right of persons with defective sight to travel in streets—notice to city—how proved.*

*See PEACH v. CITY OF UTICA*..... 477

—*Excavations in, liability of municipal corporation for—what precautions are required.*

*See PARKER v. CITY OF COHOES*..... 531  
*See HIGHWAYS.*

**SUBROGATION**—*Of insurance company in place of party insured, to rights against third party causing the loss—release by insured to party causing the loss—effect of on rights of insurance company.*

*See CONNECTICUT INS. CO. v. ERIE RAILWAY Co.*..... 59

**SUBSCRIPTION** — *Contract — reducing of part to writing — does not preclude oral evidence of the residuum — Conditional delivery.* ] This action was brought to recover sixty per cent of a subscription, made by the defendant to the capital stock of the plaintiff. The defendant insisted that the entire agreement was not contained in the subscription paper, and that the subscription was void because delivered under an agreement that it was not to become valid or binding unless \$200,000 should be subscribed, and unless a branch office of the company were established in New York, neither of which conditions had been complied with; the defendant objected to signing the paper when presented to him because the said conditions were not therein stated, but was informed by plaintiff's agent that it would not be valid until they had been complied with; *held*, that the defendant should be allowed to prove that the paper was signed upon said conditions, and that if he succeeded in so doing he was entitled to a judgment in his favor.

BREWERS' FIRE INS. CO. v. BURGER..... 56

**SUBSEQUENT INCUMBRANCES** — *Sale of mortgaged premises — power of court to direct sale of all the property for benefit of.*

See BARNES v. STOUGHTON..... 14

— *Appointment of receiver in foreclosure suit on application of — who entitled to amount collected.*

See WASHINGTON LIFE INSURANCE CO. v. FLEISCHAUER..... 117

**SUBSTITUTION** — *Of new note for old and usurious one — right of bona fide holder.*

See SHERWOOD v. ARCHER..... 78

**SUMMARY PROCEEDINGS** — *Eviction of tenant by landlord.* ] 1. Where a tenant has been evicted by the landlord from a portion of the demised premises of substantial value, he cannot be evicted in summary proceedings for non-payment of rent so long as such eviction continues.

PEOPLE EX REL. MURPHY v. GEDNEY..... 151

2. — *Sufficiency of affidavit to procure summons — Certificate of service by constable.* ] An averment in an affidavit, made in summary proceedings instituted to remove a tenant, that the amount specified is due for the rent of the premises, in pursuance of the agreement by which the premises were "let," in connection with a statement that the defendant holds over and continues in possession of said premises, is substantially equivalent to the statement that the amount is due pursuant to the agreement under which the premises are "held," as required by the statute.

The certificate of the constable, showing a service of the summons upon the defendant personally, by showing the original and delivering a copy thereof to him, is "due proof" of the service thereof.

PEOPLE EX REL. HUGHES v. LAMB..... 348

**SUPERVISORS** — *Power of board of, to reduce the width of a highway — notice to parties interested — chap. 482 of 1875.*

See PHILLIPS v. SCHUMACHER..... 405

— *Application to, under § 20 of chap. 482 of 1875, to purchase site for town hall — what is proper.*

See BERGEN v. GUBNA..... 11

**SUPPLEMENTARY PROCEEDINGS** — *Order appointing receiver in — title to real estate, not passed by recording of.* ] 1. On November 27, 1874, a judgment was recovered against the defendant Elmore, who was in possession of and entitled to a life estate in certain real property. Execution having been issued upon said judgment and returned unsatisfied, supplementary proceedings were instituted, in which, on June 25, 1875, a receiver of the property of the said Elmore was duly appointed by an order which was duly recorded. July 1, 1875, the receiver conveyed all the right, title and interest of Elmore in the said real estate to the plaintiff. Elmore never made any conveyance to the receiver, nor was any order ever made by the court requiring him so to do, or directing a sale by the receiver.

*Held*, that the receiver was not vested, by virtue of his appointment, with

**SUPPLEMENTARY PROCEEDINGS** — *Continued.*

PAGE.

any title to the real estate owned by the judgment debtor, nor did the plaintiff acquire any interest therein by virtue of the conveyance from him.

SCOTT v. ELMORE ..... 68

2. — *Power of referee to adjourn proceedings.*] A judge or referee in supplementary proceedings is vested with the same power of adjournment that a master in chancery had when acting under an order for the examination of a debtor in a creditor's suit, and he may adjourn the proceedings from time to time, even though the debtor to be examined refuses to consent thereto.

KAUFMAN v. THRASHER ..... 438

3. — *Receiver in — powers of.*] A receiver appointed in proceedings supplementary to execution, may maintain an action to recover real or personal property transferred by the judgment debtor in fraud of his creditors.

UNDERWOOD v. SUTCLIFFE ..... 453

4. — *Irregularity in appointment of — who may take advantage of.*] No person can avail himself of an irregularity in the proceedings in which the receiver was appointed, except the judgment debtor himself. *Id.*

5. — *In the nature of an action.*] Proceedings supplementary to an execution are in the nature of an action, and the court does not lose jurisdiction thereof, by a failure of either or both of the parties to appear on a day to which they have been adjourned by the judge or referee. *Id.*

6. — *Waiver of irregularity.*] Where, in such a case, the attorney for the judgment debtor appears before the judge, in obedience to a notice to show cause why a receiver should not be appointed, and makes no objection thereto, all objections to the regularity of such proceedings are thereby waived. *Id.*

**SUPREME COURT** — *Equitable jurisdiction of — extent of — Const., art. 6, § 8.*

See YOUNGS v. CARTER ..... 194

— *Power of, on sale of mortgaged premises, to direct sale of all the property for the benefit of subsequent incumbrancers.*

See BARNES v. STOUGHTON ..... 14

**SURETIES** — *Liability of, upon undertaking given in an action of replevin.*

Where, in an action of replevin, the plaintiff recovers a judgment for the possession of the property, with damages for its detention, and for a fixed sum in case a return cannot be had, he cannot maintain an action against the sureties to an undertaking given by the defendant, in pursuance of section 211 of the Code, until an execution has been issued to the sheriff in pursuance of the judgment and the same has been duly returned unsatisfied.

HAGER v. CLUTE ..... 447

**SURETY :**

See PRINCIPAL AND SURETY.

**SURGEON** — *Malpractice — what skill required of him.*

See CARPENTER v. BLAKE ..... 358

**SURROGATE** — *Jurisdiction of, over claim presented by executor.*] 1. A surrogate has no jurisdiction or authority to pass upon the validity of a claim against an estate presented by an executor in his own behalf, where the same is contested, nor can a reference be ordered in such a case to determine the same, though all the parties consent thereto.

The expenses incurred by an executor in an unsuccessful attempt to enforce before the surrogate, a claim made by him against the estate, including the fees of an auditor and his own counsel fees therein, should not be allowed to him out of the estate. SHAKESPEARE v. MARKHAM ..... 311

2. — *Administrator — accounting by — next of kin must be parties to.*] Where one of the next of kin of a deceased person, entitled to a distributive share of his estate, calls the administrator to an account, and, upon the hearing, claims to be entitled, by assignment, to the shares of three of the other next of kin, it is error to direct that the amount of said shares should be paid over to him, unless the persons originally entitled thereto are made parties to the proceeding, as otherwise the decree would afford no protection to the administrator. CLOOK v. CHADEAGNE ..... 97



**SURROGATE — Continued.**

PAGE.

3. — *Statute of limitations — how interposed in such proceedings.*] A surrogate cannot entertain proceedings instituted by one of the next of kin of a deceased person against an administrator, to enforce the payment of a distributive share of the estate of the deceased, when such proceedings are not commenced before the expiration of the time within which the distributee might have brought an action under section 9 of 2 Revised Statutes, 114.

In such proceedings no formal written pleading is necessary to entitle a party to the protection of the statute, but it must be set up or urged before all the evidence has been taken, so that the claimant may have an opportunity to introduce evidence which may relieve him from the operation thereof. *Id.*

4. — *Examination as to effects of deceased persons — Chap. 394, of 1870 — Inadmissibility of testimony objectionable under § 399 of Code.*] Under chapter 394, of 1870, authorizing an executor or administrator to institute an inquiry as to any effects of the deceased, believed to be withheld or concealed from him, the surrogate acts judicially in conducting the examination, and the testimony receivable therein is subject to the restrictions of section 399 of the Code, prohibiting the admission of evidence given by parties interested in the proceeding as to personal transactions had with the deceased.

TILTON v. ORMSBY ..... 7

5. — *Order for delivery of property to executor — Evidence justifying.*] In order to justify an order requiring the delivery of the property to the executor or administrator, the surrogate must find, as a fact, that it belongs to the estate; it is not enough that he should determine that there is probable cause to believe that it belongs to it. *Id.*

6. — *Form of order.*] The order should specify distinctly the property, delivery of which is required, and an order which, after specifying certain articles, proceeds, "and all other property, goods, etc., of the said (deceased), in her possession or under her control at her place of residence," is too broad and must be reversed. *Id.*

7. — *Of New York — accounting — reference.*] Power of, under section 6 of chapter 359 of 1870, to appoint a referee to examine an account and report thereon to him, where objections are filed by the applicant to an account rendered pursuant to an order, made on an application for an accounting by one executor requiring his co-executor to render and file an account under 2 Revised Statutes, 92, section 52. BUCHAN v. RINTOUL ..... 183

8. — *Power of, to allow costs and allowances — 2 R. S., 223, § 10.*] Under the provisions of 2 Revised Statutes, 223, section 10, providing that "the surrogate may award costs to the party in his judgment entitled thereto, to be paid either by the other party personally or out of the estate," the surrogate is authorized to award costs to the successful party only, and he has no power to award costs to the defeated contestants.

NOYES v. CHILDREN'S AID SOCIETY ..... 289

9. — *New York county — § 9 of chap. 359 of 1870.*] Section 9 of chapter 359 of 1870, providing that "the surrogate of said county (New York) may grant allowances in lieu of costs to counsel in any proceedings before him in the same manner as are now prescribed by the Code of Procedure," restricts his power to make allowances, to those cases in which he is authorized to award costs under the provisions of the Revised Statutes, and he has, therefore, no power under the said act to make allowances to the unsuccessful parties in cases contested before him. *Id.*

— *Administrator with will annexed — administers entire personality — what assets justify his appointment — the appointment cannot be attacked collaterally.*

See SULLIVAN v. FORDICK ..... 173

— *When judgment of, reversed because of improper rejection of evidence.*

See HORN v. PULLMAN ..... 471

— *Probate of will — admissions of devisees — when admissible.*

See HORN v. PULLMAN ..... 471

**SURVEY — Of property in deed — must commence at the place of beginning in deed.**

See ELLIOTT v. LEWIS ..... 486

**SYRACUSE**—*Board of health of—power of to appoint inspector of milk—destruction of impure milk.*

See *BLAZIER v. MILLER* ..... 435

**TAVERN:**

See *HOTEL*.

**TAX**—*Refunding illegal tax—in what cases County Court has power to order—chap. 695 of 1871.*

See *PEOPLE EX REL. HERMANC v. SUPERVISORS* ..... 545

—*Redemption from, in the city of New York—chap. 274 of 1876.*

See *PEOPLE EX REL. DOUBLEDAY v. KELLY* ..... 283

**TAXATION**—*What subject to—"land"—meaning of.] Certain lots under water were conveyed to the relator's grantor by the city of New York, the conveyance reserving therefrom so much thereof as formed part of Stanton street, "for the use and purpose of public streets and highways," the grantee covenanting to build a wharf on that portion reserved for Stanton street, and keep the same in good repair, and that the same should always be used as a public wharf, he to have and enjoy all wharfage, crantage, benefits and advantages growing or arising from the wharf so erected. Held, that the interest of the grantee in the wharf so erected was "land," within the meaning of that term as used in the statutes of this State relating to taxation, and was properly assessed as such thereunder.*

*PEOPLE EX REL. SMITH v. COMRS. OF TAXES* ..... 207

—*Exemption from—created by 1 R. S. [5th ed.], 906, § 5—effect of running highway through lot.*

See *PEOPLE EX REL. ST. JOHN'S COLLEGE v. COMRS. OF TAXES*... 246

—*Assessment for—what property subject to—extent of the State authority over regulation of commerce with foreign States—duties on imports and exports.*

*PEOPLE EX REL. HANEMAN v. COMRS. OF TAXES*.... 255

**TENANT:**

See *LANDLORD AND TENANT*.

**TENDER**—*Specific performance of contract—when ordered, notwithstanding failure to tender deed.*

See *BUESS v. KOCH* ..... 299

**TESTIMONY**—*Inadmissibility of, on examination under chap. 894 of 1870, against the restrictions of section 899 of the Code.*

See *TILTON v. ORMSBY* ..... 7

—*Of experts—form of questions—Tonnage of vessels given in charter-party—when not conclusive.*

See *DOLZ v. MORRIS* ..... 201

**TIMBER**—*Cutting of—Injunction to restrain—not granted for mere threats, unaccompanied by acts.*

See *GRIFFIN v. WINNE* ..... 571

**TIME**—*Allegations in pleading—relatives to time of commencement of suit—residence of defendant in action in County Court.*

See *BURNS v. O'NEIL* ..... 494

**TITLE**—*To real estate—does not pass by virtue of an order appointing a receiver in supplementary proceedings—or by its recording—A conveyance by such receiver, no conveyance having been made to him by the judgment debtor, nor any order made by the court requiring the debtor to convey or the receiver to sell, passes no title.*

See *SCOTT v. ELMORE* ..... 68

—*To real estate—power of court to direct a sale by its officers of real estate fraudulently conveyed—proper form of decree.*

See *VAN WYCK v. BAKER* ..... 39

—*When it passes, under a contract of sale.*

See *MORRY v. MEDBURY* ..... 540

**THREATS** — *Of cutting timber not accompanied by acts — not ground for injunction to restrain.*

*See* GRIFFIN v. WINNE..... 571

**TONNAGE** — *Of vessel given in charter-party — when non-conclusive.] A charter-party was made between J. L. Robart, master and agent for owners of brig Ottawa, "of the burden of one hundred and fifty-eight tons or thereabouts," and the plaintiff. In an action by the latter to recover for a breach of the contract, held, that he was entitled to show, for the purpose of enhancing the damages, that the brig was in reality of 250 tons burden.*

DOLZ v. MORRIS..... 201

**TORT** — *Infant — action against must be purely for tort — fraudulent representations.*

*See* HEWITT v. WARREN..... 560

**TOWN** — *Commissioner of highway not agent of.*

*See* PEOPLE EX REL. VAN KEUREN v. AUDITORS..... 551

**TOWN HALL** — *Purchase of site for — application to supervisors therefor, under § 20, chap. 483 of 1875 — what is proper.] Upon the application of certain tax-payers of the town of New Utrecht, the board of supervisors ordered a special town meeting, "to consider and decide the question of purchasing a site for a town hall." At a meeting held in pursuance of this order a resolution was adopted "that the question be determined by ballot of the votes of this town meeting, whether a site shall be purchased for a town hall, and a building purchased or erected for such hall." \* \* \* Upon the return of an affirmative vote on this resolution to the board of supervisors, authority was given to the town to purchase the site and erect the hall, and to borrow money for that purpose. Held, that the resolution adopted by the town meeting was a sufficient compliance with section 20, chapter 483, of 1875, empowering the board of supervisors to authorize any town, when application shall be made therefor by vote of a majority of the electors \* \* \* to purchase a site for a town hall, and erect a building thereon.*

The power conferred by this section is not restricted by chapter 197, of 1847, and chapter 157, of 1849, authorizing the erection of a town hall by the said town and limiting the amount to be expended therefor.

BERGEN v. GUENA..... 11

**TRADE** — *Covenants in restraint of — in action upon, plaintiff must show that the covenant was founded upon a valuable consideration.*

*See* WELLER v. HERSEE..... 481

**TRANSFER OF INTEREST** — *By assured in property insured — when policy avoided by.*

*See* SHERWOOD v. AGRICULTURAL INS. CO..... 598

**TREES:**

*See* TIMBER.

**TRIAL FEE** — *Discontinuance of action when reached on the calendar.] After an action had been noticed for trial and placed upon the calendar, and just as it was about to be moved for trial, an order was entered discontinuing the action upon payment of costs. Held, that the defendant was not entitled to include a trial fee in such costs. SUTPHEN v. LASH..... 120*

**TRIAL OF ACTION** — *After service of an offer to allow judgment to be taken, but before the expiration of ten days from such service — plaintiff entitled to disregard the offer and tax the costs thereafter accruing.*

*See* HERMAN v. LYONS..... 111

**TRIAL:**

*See* PLACE OF TRIAL AND VENUE.

**TROY** — *City of — powers of common council — city advertising — notices of tax sales.] The charter of the city of Troy confers upon it the right to collect taxes. Held, that the power to determine the extent to which notices of*

**TROY** — *Continued.*

PAGE.

sale of property for non-payment of taxes should be published was conferred upon the city as incidental thereto.

The charter authorized the common council to appoint four official papers "in which the city advertising" should be done. *Held*, that the notices of sale of property for non-payment of taxes was city advertising within the express language of the charter.

The charter requires the chamberlain to publish such notices in two of the official papers. *Held*, that this did not affect the right of the common council to direct their publication in the two other official papers.

FRANCIS v. CITY OF TROY ..... 515

**TRUST** — 1. Where an assignment had been made (December 31, 1870) of portions of an award of \$40,000 on widening and straightening Broadway, New York city, under chapter 890 of 1869, for \$12,262 thereof, in writing, by one Thompson, to whom the award was made as owner of the leasehold interest in several lots taken by the commissioners and confirmed by the court December 28, 1870, which assignment contained covenants that an award, exceeding in amount \$12,262, had been made to him by the commissioners and confirmed by the court; that there were no liens thereon; that he had done and would do nothing to prevent the collection of said amount, and authorized said assignee to demand, receive and receipt for the said sum, and also authorized the comptroller or chamberlain of the city to pay the same. Subsequently the Special Term of this court, under chapter 57 of 1871, vacated and set aside the said report and appointed new commissioners to make a new assessment, both as to awards for damages and appraisements for benefits, in which proceedings Thompson was only awarded \$11,544.

On the 11th of January, 1871, prior to the setting aside of the \$40,000 award, Thompson executed to one M., who had knowledge of the previous assignment, a mortgage upon the lease and leasehold premises taken for said widening, for \$12,350 and interest, which said mortgage was duly recorded, and at the same time assigned the said sum of \$12,350 out of the \$40,000 award. *Held*, that the assignment first mentioned, with the covenants therein contained, created between Thompson and said assignee the relations and all the obligations of a *trust*, which a court of equity would enforce upon any specific award of damages which might be made for Thompson's leasehold interest in the premises, even though the award referred to and described in the assignment had been set aside. *Held*, further, that the claims of the first assignee upon the amount finally awarded were superior to those of one claiming under the mortgage and assignment to M. **SPEARS v. MAYOR**..... 160

2. — *Trustee takes only sufficient estate to fulfill trusts — Statute of uses — vested equitable estate in remainder — made a legal estate by — Rule in Shelly's Case.* This was an action of ejectment, brought by the plaintiff to recover the undivided one-third of a lot in the town of Frankfort. It appeared upon the trial, that on the 24th day of May, 1808, Martha Codd, wife of Matthew Codd, owned the lot in fee simple, subject to the marital rights of her husband, and was in possession thereof, and that plaintiff, the daughter of the said Martha and Matthew, was then living. That on that day the said Martha and Matthew executed an indenture whereby they conveyed the said premises, with others, to Varrick and Breese, "in trust, for the uses, intents, and purposes" (first) to sell so much as should be necessary to pay debts; (second) to lease, manage, etc., the same, and pay over the net profits of the residue thereof to the said Matthew and Martha for the terms of their natural lives, and (third) to "hold all the residue of said land, and over and above what may be sold as aforesaid for the payment of said debts \* \* \* for the sole use, benefit and behoof of such persons as shall be the right heirs of them, the said Matthew and Martha Codd, at the time of the death of the survivor of them," etc.

Martha Codd survived her husband, and died in 1871, the land being then held by a trustee appointed by the court in place of Varrick and Breese. *Held*,

(1) That the trustee took only such an estate as was necessary to enable him to fulfill the purposes of the trust, and that such estate terminated upon the death of the survivor of the said Matthew and Martha ;

**TRUST — Continued.**

PAGE

(2) That the plaintiff, under the statute of uses, took a legal vested estate in remainder, immediately, upon the execution of the deed;

(3) That the rule in *Shelly's Case* did not apply, the estate of the grantors being equitable and that in the heir a legal estate, and hence plaintiff took by purchase and not by descent.

The deed provided that the grantors might, by a joint will or appointment, direct and appoint the persons to whom the residue of the estate should go, and also authorized the trustee, upon their request, in writing, to sell any portion thereof. *Held*, that as such powers had never been exercised they were of no importance in ascertaining the rights of the parties created by the deed. BENNETT GARLOCK..... 828

— *When a power is in — when power beneficial.*

See JENNINGS v. CONBOY..... 77

**TRUSTEES —** *Of manufacturing corporation—liability of, for failure to file report required by chapter 40 of 1848 — each creditor can sue separately for his debt.*

See WILES v. SUYDAM... 578

— *Under railroad mortgage — taking possession of road thereunder — Right of debtor of railroad to offset claim against the company falling due after change of possession.*

See MURRAY v. DEYO..... 3

**ULTRA VIRES —** *Contract of national bank — when, though it is ultra vires, such defense cannot be set up in an action thereon — estoppel.*

See BUSHNELL v. CHAUTAUQUE COUNTY NATIONAL BANK..... 378

**UNDERTAKING —** *In replevin — liability of sureties upon — action upon, not maintainable until after execution has been returned unsatisfied.*

See HAGER v. CLUTE... 447

**UNITED STATES COURT —** *Removal of actions to, under chap. 187 of 1875 — averments in petition not binding on court.*

See CLARK v. OPDYKE..... 383

— *Where it has exclusive jurisdiction over action to recover assets of bankrupt — § 2 of chap. 390 of act of Congress of 1874.*

See OLCOTT v. MACLEAN..... 277

**UNITED STATES STATUTES —** 1874, chap. 390, § 2 — *Bankruptcy — Assignee — when United States District Court has exclusive jurisdiction to recover assets of bankrupt.*

See OLCOTT v. MACLEAN..... 277

— 1875, chap. 137 — *Removal of action into United States court under — averments of petition not binding on court.*

See CLARK v. OPDYKE... 383

**UNITED STATES REVISED STATUTES —** § 5128 — *Assignee in bankruptcy — action to recover assets of bankrupt — in what court it must be brought — jurisdiction of State court — of United States District Court — when exclusive — § 2 of chap. 390 of act of congress of 1874.* By section 2 of chapter 390 of the act of congress of 1874, providing "that the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt \* \* \* shall, when such debt does not exceed \$500, be collected in the courts of the State where such bankrupt resides," the United States District Court is vested with exclusive jurisdiction over all actions brought by an assignee to recover property alleged to have been transferred by the bankrupt in violation of section 5128 of the United States Revised Statutes, where the value of such property is greater than \$500.

Although prior to the passage of the act of 1874 the State court had concurrent jurisdiction with the United States District Court over such actions, yet by the passage thereof such jurisdiction was withdrawn from it, even as to actions theretofore commenced and then pending therein.

OLCOTT v. MACLEAN..... 277

**UNLIQUIDATED DEMAND** — *For professional services — interest cannot be allowed upon the amount recovered in an action for, from the time of the rendition of the services.*

See GALLUP v. PERUE ..... 525

**USERS** — *Statute of — vested equitable estate in remainder made a legal estate by.*

See BENNETT v. GARLOCK ..... 528

**USURY** — *Mortgage — sale of — Certificate of mortgagors — when it operates as an estoppel.* ] 1. Where a bond and mortgage, executed without any consideration moving from the mortgagee, are sold to a third person or placed in his hands for negotiation, upon a usurious agreement, and the same are subsequently sold to one who purchases the same, relying upon a certificate given by the mortgagors, which states that they were executed upon a full, lawful and valid consideration, and that there was no defense thereto, or equities, latent or apparent, in any way affecting the same, the parties signing the said certificate are estopped thereby from setting up the invalidity of the bond and mortgage in an action brought by the purchaser to foreclose the same. NICHOLS v. NUSSEBAUM ..... 214

2. — *Certificate — fraudulently obtained.* ] Where such certificate is signed by the mortgagors, without knowledge of and by reason of misrepresentations made in regard to its contents, they are not thereby estopped from setting up the invalidity of the mortgage. *Id.*

3. — *Knowledge of purchaser.* ] Where the purchaser, at the time of the purchase, knows that the bond and mortgage are usurious and void, and that the statements contained in the certificate are untrue, he can derive no benefit or protection therefrom. *Id.*

4. — *Substitution of new note for old one — rights of bona fide holder.* ] One Treadwell held an over-due promissory note given by the defendants, which was void for usury. Treadwell being indebted to the plaintiff to the amount of the said note, a note was given by the defendants, payable to the order of the plaintiff, and the same was subsequently delivered to her, she being ignorant that Treadwell had received any usurious interest from the defendants.

In an action by her upon the second note, *held*, that the plaintiff was entitled to recover; that the defendants, by making the note to her order, represented to her that the transaction in which it was given was a lawful one, and that they were estopped to deny the truth of this representation.

SHERWOOD v. ARCHER ..... 78

5. — *How pleaded.* ] A plea of usury must set forth the usurious agreement, the names of the parties between whom it was made, the amount loaned, the amount of usury agreed to be paid, the length of time for which the loan was agreed to be made, and that the agreement was corrupt.

An answer which fails to allege any agreement between the parties, but merely alleges that the plaintiff took and reserved more than seven per cent, without, so far as appears, the consent of the borrower, is fatally defective. NATIONAL BANK of AUBURN v. LEWIS ..... 468

— *Can be set up as a defense, by an amendment to answer — in allowing amendments to answers the court does not now regard the character of the defense sought to be interposed.*

See BARNETT v. MEYER ..... 109

— *Must be pleaded.*

See HAYWOOD v. JONES ..... 500

**UTICA** — *City of — liability of for defects in streets — funds in treasury to make repairs not essential to — rights of person with defective sight to travel in streets — notice to city — how proved.*

See PEACH v. CITY OF UTICA ..... 477

**VENDOR AND PURCHASER** — *Contract of sale — articles to be delivered at purchaser's option on notice at any time before a fixed day — if no notice is given vendor may after that day bring action for the price.*

See BUSHNELL v. CHAUTAUQUE COUNTY NATIONAL BANK ..... 878

**VENDOR AND PURCHASER**— *Continued.*

PAGE.

- *Chattel mortgage given back on purchase of property — the chattels remain personal although annexed to real property.*  
*See* **SISSON v. HIBBARD**..... 420

**VENUE** — *Change of, for convenience of witnesses.*] When, upon a motion to change the place of trial, the defendant swears to nineteen witnesses residing in another county, all of whom are sworn to be material, and the plaintiff swears to no witnesses residing in the county where the venue is laid, but simply sets forth, in his affidavit, facts tending to show that the defense sought to be established by defendant's witnesses has no real existence, the motion should be granted. **WIGGIN v. PHELPS** ..... 187

- *Action against sheriff and others — right of sheriff to remove it to his own county — Code § 124.*  
*See* **WINTJEN v. VERGES**..... 576

**VERDICT** — *Form of — in replevin.*] In an action to recover the possession of personal property, which has not been delivered to the plaintiff, the jury should assess the value of the property and damages for its detention, and not simply find a general verdict for damages, and the judgment in such a case should be for the recovery of the property, or the value thereof in case a delivery could not be had, together with damages for its detention.  
**PHILLIPS v. MELVILLE** ..... 211

- VICIOUS DOG** — *Liability of owner of.*  
*See* **MULLER v. MCKESSON**..... 44

**VOLUNTARY PAYMENT** — *Based on erroneous certificate.*] The plaintiff's assignor entered into a contract with the trustees of the town of Morrisania, by which he was to receive fifty cents per yard for all filling made thereunder. Subsequently the engineer gave a certificate in which the price was stated at seventy-five cents per yard, and certificates of indebtedness for the amounts of the bills so certified were issued by the board of trustees of the said town. *Held*, that as the engineer and trustees were only the agents of the corporation, it was not bound by their unauthorized acts, and that the payment could not therefore be regarded as a voluntary one.  
**DONOHUE v. MAYOR**..... 87

- WAIVER** — *Of conditions of policy of insurance — powers of agent.*  
*See* **VAN ALLEN v. FARMERS' JOINT STOCK INS. CO.**..... 397

**WAREHOUSEMAN** — *Delivery of goods to wrong person — distinction between his liability and that of a common carrier.*  
*See* **SCHUE v. ERIE RAILWAY CO.**..... 498

- WASTE** — *Cutting timber — injunction to restrain — not granted for mere threats, unaccompanied by acts.*  
*See* **GRIFFIN v. WINNE**..... 571

**WATER** — *Right of user by riparian owner — pollution of — remedy of party aggrieved by.*] Plaintiff built three ponds, for hatching and rearing trout, in a stream running through his land, which entered the same from the land of Hicks. Defendants dug a ditch from the rear of certain dwellings, erected by them, through Hicks' land to the stream, and discharged drainage and waste water therein, whereby plaintiff's trout were killed. *Held*, that he was entitled to an injunction restraining the defendants from further corrupting and polluting the said stream. **SEAMAN v. LEE** ..... 607

- *Basement — right to use water from spring on another's land.*  
*See* **MERRILL v. CALKINS**..... 495

**WHARF** — *Interest in — is within the meaning of the term "land," as used in the statutes of this State relating to taxation, and is properly assessed as such thereunder.*  
*See* **PEOPLE EX REL. SMITH v. COMRS. OF TAXES**..... 207

**WILL** — *Absolute legacy to one — remainder to another, if the property be not disposed of by first legatee — construction of.*] A testatrix, by her will, devised and bequeathed all the rest, residue and remainder of her estate "unto my

**WILL** — *Continued.*

PAGE.

beloved husband, Thomas Scott, but such part thereof as he may have at the time of his decease, I give, devise and bequeath unto my niece, Mary Louise Ledyard, and my nephew, Guy Carlton Ledyard." *Held*, that the husband took an estate for life in the property described in the will, with power to sell and dispose of the same, so far as necessary to secure to himself the full beneficial enjoyment thereof, and that the nephew and niece were entitled to what might remain undisposed of by him at the time of his death.

<b>COLT v. HEARD</b> .....	189
— <i>Powers</i> — must be either beneficial or in trust — when invalid. See <b>JENNINGS v. CONBOY</b> .....	77
— <i>Agreement to leave property by</i> — must be certain and definite — services rendered in expectation of — remedy of party rendering the services. See <b>SHAKESPEARE v. MARKHAM</b> .....	311
— <i>Probate of</i> — admissions of devisees — when admissible — Improper rejection of evidence by surrogate — when his judgment reversed, because of. See <b>HORN v. PULLMAN</b> .....	471
— <i>Construction of</i> — advancement — when interest commences to run on. <b>VERPLANCK v. DE WENT</b> .....	611

**WITNESS** — A surrogate acts judicially in conducting examination as to effects of deceased person under chap. 894 of 1870, and the testimony receivable on such examination is subject to the restrictions of section 899 of the Code.

See <b>TILTON v. ORMSBY</b> .....	7
— <i>What question calls for opinion of.</i> See <b>MURRAY v. DEYO</b> .....	3
— <i>Change of venue for convenience of</i> — motion for granted, when opposing affidavit simply sets forth facts tending to show that the facts sought to be established by defendant's witnesses have no existence. See <b>WIGGIN v. PHELPS</b> .....	187
— <i>Testimony of, as to general reputation</i> — what questions may be asked. See <b>CARPENTER v. BLAKE</b> .....	358
— <i>Statement by, of what was said to him by another witness before the trial</i> — admissibility of. See <b>SHEAR v. VAN DYKE</b> .....	528
— <i>Experts</i> — Evidence of, in cases of insanity — what questions may be asked. See <b>KOENIG v. GLOBE MUT. LIFE INS. CO.</b> .....	558
— <i>Examination of, on commission</i> — answers to cross-interrogatories — by whom they may be read in evidence. See <b>MARSHALL v. WATERTOWN STEAM ENGINE CO.</b> .....	463

66. 66. 66.





